BUSINESS LAW

PERCY C. FEGER

PEIRCE SERIES

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BY

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INTRODUCTION

Commercial law means that body of law which particularly concerns commerce or trade; but in the following lectures an attempt has been made briefly to summarize those rules of law which affect human relationships generally; and to acquaint the student not only with the usages and customs of business—such as the purchase and sale of commodities, methods of payment and the conduct of corporations and partnerships —but to explain those everyday contacts and occurrences which, if misunderstood, may cause great trouble and sometimes loss to any one of us.

No attempt is made to discuss abstract principles of law except in so far as such discussion is absolutely necessary. The students of business schools are learning to be practical men and women and a course in Business Law should assist them to lead useful lives without attempting to educate them for the practice of the law.

The blank pages are inserted for the use of the student who should be encouraged to work out his own problems illustrating the text.

CONTENTS

I

MAN'S RIGHTS AND DUTIES

GOVERNMENT

THE relationships of mankind are varied and complex but may be briefly divided into two great classes:

1. Those with God.

2. Those with our fellow-man.

With the former we have no concern here, directing our attention to the latter class of relationships having to do with man's rights and duties among his fellows. It is well to bear in mind that no right can exist unless there is a corresponding duty. This is a paraphrase of the old saying that "you never can get something for nothing"; somewhere you will have to pay. Those advantages that we enjoy as citizens we may be obliged to pay for even with our lives. The right to live in a community which enjoys fire and police protection is paid for by our submission, sometimes involuntarily, to various regulations and restrictions.

Rights and Duties Classified.—Man's relations to his fellow-man may be considered under two headings:

1. Those rights and duties which he takes for and upon himself voluntarily.

2. Those which he enjoys as a citizen and which are imposed upon him by the community.

In a commercial sense the first classification is of greater importance, including as it does all contractual relationships; but in the life of the average citizen the latter classification affects him more intimately, as it includes crimes and torts.

Voluntary Obligations.—Nearly all voluntary rights and duties arise out of contract or agreement between two or more persons where each gives something to the other in return for what he, himself, receives. When a man contracts or agrees with another, he must do so voluntarily; if he is compelled to do so, it is not a contract.

Involuntary Obligations.—Considering the meaning of the second classification, however, a man is compelled to do or not to do certain things. Thus he must pay his taxes and his water-rent; nor may he injure another's person or property. The student will observe that what he does voluntarily, he does for his own direct benefit; whereas, what he is required to do involuntarily is for the good of the community and his fellow-citizens.

GOVERNMENT

Theory of Government.—Government is the result of man's efforts to create, maintain and improve society. Under our theory of government the people rule through representatives. For the purpose of national defence and to preserve unity among themselves, each of the forty-eight States surrendered a part of its sovereign powers to a central authority known as the Federal Government.

Federal Powers.—Among the powers thus surrendered and now exclusively exercisable by the Federal Government are:

1. The power to declare war and establish peace.
2. To maintain a navy.
3. To provide a system of currency and to provide standards of weights and measures.

4. To regulate commerce between foreign nations and among the several States.

5. To enact bankruptcy laws.

State Powers.—Conflict of Powers.—Such powers as have not been surrendered to the Federal Government are exercisable by the States. If a State power and a Federal power are in conflict, the Federal power is supreme. Sometimes both State and National Governments have concurrent powers and if a State has exercised its power in the premises it is supreme until the Federal Government chooses to exercise its own right, when, if there be a conflict, the Federal power prevails.

Constitutions.—In order to prevent their representatives from exercising dangerous powers of government, the people of the various States have adopted solemn instruments called constitutions, which are charters of liberty and of right. The Federal Government is likewise founded upon and limited by an agreement made by the States and the people of the States. This instrument is called the Federal Constitution.

Assumed Powers.—Early in our national history the Supreme Court of the United States assumed the power to declare an Act of Congress to be in conflict with the Federal Constitution. Following its lead every State court has since assumed this power. Among students of government it would appear that in a land where the people rule there was no intention to submit the validity of their solemn legislative acts to review by a small group of men, who frequently—by a bare majority—declare that what the people seek to do conflicts with the fundamental law.

General Powers.—Government has certain inherent powers which are:

1. Power to tax inhabitants for the support of government.

2. Power to compel a citizen to pay his just debts.

3. Power to condemn private property for public use, compensating the owner therefor.

4. Power to require citizens to bear arms in the national defence.

5. An extraordinary power, called the police power, under authority of which a State maintains order and provides for the health, safety, morals and general welfare of its citizens. In the exercise of this, the most arbitrary of the powers of government, the private property of a citizen may be destroyed without compensation being made to him. The right of the State to enforce vaccination, to destroy gambling paraphernalia, to establish quarantines, to destroy immoral literature and to dynamite buildings to prevent the spread of fire, are illustrations of the police power.

The sole restriction upon the police power is that its exercise must be reasonable; and the courts determine this question.

Burdens of Citizenship.—As a result of the exercise of governmental powers, the citizen must bear the following obligations:

1. Must pay taxes.

2. Must obey laws, ordinances and orders of courts of justice.

3. Must bear arms in defence of his country.

4. Must so use his own property as not to injure another.

5. Must so conduct himself as not to injure another.

II

CONTRACTS—IN GENERAL

Among those rights and duties which a man takes upon himself voluntarily are those arising from his contracts, as stated in Lecture I. The underlying principle of all contracts is that the agreement is purely voluntary. If there is any compulsion, whereby one of the parties is forced to agree, then there is no real contract. Most of the transactions between men in everyday life are contracts or voluntary agreements.

List of Ordinary Contracts.—The following is a partial list of such contract transactions:

1. Sales, either of personal property or of real estate.
2. Leases, either of personal property or of real estate.
3. Transportation, — freight, passenger, express, mails and cartage.
4. Employment.
5. Insurance,—life, fire, marine and casualty.
6. Labor and materials, building and repairs.
7. Bills and notes, negotiable instruments.
8. Loans.
9. Guaranty and suretyship.
10. Bailments and pledges.

Definition of Contract.—A contract may be briefly defined as a voluntary agreement between two or more persons for the breach of which the law affords a rem-

edy. (The business man is not interested in a contract for the breach of which there is no remedy.) This remedy may be:

1. Damages.
2. Injunction.
3. Specific performance.

There are certain cases in which two of these remedies may be applied at the same time; for instance, the court granting an injunction may also award damages.

Definition of Damages.—Damages is a sum of money which is awarded by the judgment of a court to the injured party to pay him for his loss. Damages ordinarily do not include profits or anything which is uncertain, but are awarded as compensation only.

Definition of Injunction.—Injunction is an order of a court forbidding a man doing something which the court says is wrong. In a contract case a man may be forbidden to take advantage of his breach of the agreement.

Definition of Specific Performance.—Specific performance is an order of a court compelling a man to carry out his agreement as he promised to do. This remedy in contract cases finds its chief application to agreements for the sale of real estate.

Where Remedies May Be Sought.—Proceedings for damages are brought in a court of law, while those for injunction and specific performance are instituted in a court of equity.

III

CONTRACTS—CLASSIFIED

CONTRACTS are divided into two classes:

1. Those under seal, called specialties.

2. All other contracts not under seal, whether written or oral, called parol contracts.

A seal was a sacred thing at the common law, for it was used in place of a signature in ancient times when few men could write their names. In those days the seal on a paper or parchment was made with a signet (signature) ring impressed upon wax and as this ring was carried upon the person of the contractor, there was little likelihood of forgery. To-day in some States the seal has lost its formality, but in others it retains the same solemn character it had at common law.

Kinds of Seals.—There are different kinds of seals as follows:

1. Printed seal—(SEAL) (L. S.).

2. Scroll seal, usually made with a pen.

3. Sticker seal, which is attached to the paper.

4. Wax wafer, impressed with a die or signet.

5. Court, corporate and notarial seals usually impressed in the paper itself by a die.

Sealed Contracts.—Contracts under seal include deeds, mortgages, mortgage-bonds, releases and judgment notes. The chief differences between contracts under seal and parol contracts will be treated under the

topics "Consideration" and "Statute of Limitations."

Parol, Including Oral Contracts.—Parol contracts, as stated above, include written agreements not under seal as well as oral agreements.

Necessity for Written Contracts.—An oral agreement in most cases is as binding as a written agreement (except where required to be in writing by the Statute of Frauds), but it is very difficult to prove its terms. The recollections of witnesses who have heard an oral agreement made usually prove faulty and a jury is obliged to guess what was really agreed upon. Consequently all important business contracts should be in writing but need not be under seal.

Executory and Executed Contracts.—When a contract has been entered into but has not yet been fulfilled it is said to be executory; while if completed it is said to be executed. Where one man has carried out his part of the contract, he is said to have executed his agreement, although the other contractor has not yet performed and although as to him the contract is executory.

Signature of Illiterate or Disabled Person.—Where a man is unable to sign his name, he may make his mark in the following manner, his name having been written in by the witness who should attest the mark by writing his name at the lower left-hand side of the instrument:

Witness:

JOHN JONES,
2213 Van Pelt Street.

His
JOHN (X) SMITH.
Mark

IV

ESSENTIAL PARTS OF CONTRACTS

CONSIDERATION—REAL AGREEMENT, ETC.

Essentials of Contracts.—Contracts which the law will enforce must contain the following essentials:

1. Consideration.
2. A real agreement, free from mistake, fraud and coercion.
3. For a legal object.
4. Sometimes in a legal form (see Statute of Frauds).
5. Competent parties.

Consideration.—1. Consideration is anything of legal value which is exchanged in accordance with the terms of a contract. There are really two considerations, that which A receives from B and that which B receives from A. Consideration need have no actual value nor will a court inquire into its value except where a less sum is offered in payment of a greater sum. In this case the court will hold that the less sum cannot cancel the debt, so that if the debtor would protect himself he should have the creditor place a seal upon the receipt or else the debtor should deliver to the creditor some article in addition to the money.

Implied Consideration.—Besides actual or real consideration spoken of above, there is consideration implied in law. This kind of consideration is indicated

by a seal so that we say that sealed contracts need have no actual consideration. However, in most States, it is customary for a sealed contract to recite a real consideration. Thus we have in deeds a consideration of one dollar; and while the one dollar is merely nominal, yet it is a real consideration in addition to the seal on the deed.

Real Agreement, Etc., Offer and Acceptance.—2. A real agreement, free from mistake, fraud and coercion means one in which there has been an offer, clear and definite in its terms, which offer has been accepted clearly and definitely by one who understands it. He who makes the offer is called the offeror and he who receives it is the offeree. When the offeree accepts in the manner outlined above, the contract is made; then we say the minds of the parties have met —they have agreed.

Mistake.—A mutual mistake, that is, one which is made by both parties in ignorance of the true facts, will prevent the minds of the contractors from meeting and no contract will exist. But if the mistake is that of one of the contracting parties only and he had means of knowing the true facts there will be a binding agreement. Whether fraud was practised upon him or whether he had means of knowledge of which he did not avail himself are questions of fact for a jury. Wherever the mistake of one of the parties is previously known to the other who takes advantage of it, it amounts to fraud.

V

ESSENTIAL PARTS OF CONTRACTS

REAL AGREEMENT, ETC. (Continued)

Fraud.—The agreement not only must be free from mistake but it must be made without fraud. For our purposes, fraud may be described as a false statement or representation of an existing and material fact, made by one of the parties with a full knowledge on his part of its falsity or else in reckless disregard of the truth, with the intention that the other party will rely upon it; and if he does rely upon it and suffers money loss thereby, the fraud is complete.

Elements of Fraud.—Thus there are four principal elements constituting fraud, as follows:

1. Deliberate or reckless misrepresentation of an existing and material fact.

2. Made under circumstances that the other contracting party had a right to rely upon it.

3. The deception practised upon him was the reason the other party entered into the contract; if he had known the truth he would not have contracted.

4. He who was misled has suffered a loss in money or property.

In general, any act or artifice which is intended to deceive or any concealment or suppression of a material fact is fraud. The test as to the materiality of a fact really constitutes the third element; in other words,

would the contract have been entered into if it was known that the representation was false.

Deliberate or Wanton Misrepresentation.—Please remember carefully that it makes no difference whether the one guilty of fraud really knew the truth; it is sufficient if he neither knew nor cared—whether he deliberately or wantonly misrepresented.

"Let the Buyer Beware."—There is a general principal in law, most frequently applied to the sale of goods, called the doctrine of *Caveat Emptor,* which means "Let the buyer beware." This means that in any contract a man's eyes are his bargain and he must use all knowledge he can reasonably secure in order to prevent his co-contractor from cheating him. No person in business should believe all that he is told. If he has means of knowledge equal to the seller's means, he cannot be heard afterwards to say that he relied upon what his co-contractor told him.

Suppression of Truth is Fraud.—But if there are certain facts within the possession of one of the contracting parties who suppresses or misrepresents them and the other party has no means of knowing the truth, then there can be no binding agreement.

Reliance Upon Misrepresentation.—Of course, as said above, the misrepresentation must be the supposed fact upon which the other party relied. If he would have contracted anyway, he is bound by his agreement. The misrepresentation must be the inducement to contract. This is merely another way of saying that the misrepresentation must be of a material fact.

To Whom False Statement is Made.—The mis-

representation need not have been made directly to the person who was intended to be misled; it may be made to a third party if the one defrauded had a right to rely upon it.

Loss Must be Suffered.—It is hardly necessary to add that no man is really defrauded unless he has suffered a loss in money or property.

Remedies for Fraud.—He who is defrauded has the following remedies:

1. He may affirm the contract, that is, execute it and then sue for damages. He may sue either upon the original contract or in tort, called deceit.

2. He may disaffirm the contract, that is, refuse to be bound by it and sue for damages in deceit.

3. He may ask a court of equity to declare the contract void.

4. He may successfully defend any action either at law or in equity which the other party may bring against him.

5. He may sue at law to recover any property he has parted with before he discovered the fraud, and in a particularly aggravated case of this kind he may prosecute the guilty party for obtaining money or goods under false pretenses.

Coercion, Duress and Undue Influence.—Of course the minds of the parties must meet voluntarily. If one of the parties is compelled to contract, the agreement will not bind him. If the compelling force is physical, it is called duress or coercion, while if it is a moral force it is called undue influence. (The best examples of undue influence are found in will cases

where beneficiaries have unduly influenced testators in making their wills.)

Coercion Must be Real.—It should be clearly understood that a mere threat—without a present apparent intention or ability to carry out the threat—is not coercion.

VI

ESSENTIAL PARTS OF CONTRACTS

LEGALITY OF OBJECT

Contracts should have legal objects, that is, what the parties are agreeing to do must be something which the law permits them to do.

Illegal Objects Classified.—The best way to explain legal objects is to describe illegal objects. The latter may be classified into two divisions:

1. Agreements whose object is forbidden by the law of the land.

2. Agreements whose object is opposed to public policy—the general welfare of the community.

Included in the first class are:

a. Agreements for the commission of a crime.

b. Agreements for the commission of a civil wrong or tort.

c. Gambling or wagering agreements.

d. Agreements made on Sunday.

e. Agreements violating the laws against usury.

Both *a* and *b* contracts named above are obviously void.

Gambling Contracts.—*c.* The law of most States provides that wagering and gambling contracts, being based upon chance or hazard, are void. These include bets on horse races, upon cards and upon stock-market

transactions where there is no intention to deliver the stock. In all gambling contracts, where the money remains in the hands of the stake-holder, it may be recovered by either party; but if the contract has been completely executed by both parties, the courts will not disturb the transaction.

Prosecution of Gambling.—The District Attorney of any County is the proper person to enforce the laws against gambling, although in many cases prosecutions are begun by private persons. Gambling through the mails may be stopped by the Post Office Department.

Petty Gambles.—The authorities sometimes ignore petty gambles or lotteries which have for their purpose the raising of money for religious or charitable objects.

Swindles.—A distinction should be made between gambling contracts where each party has a chance to win and those which are swindles where the schemer alone can win. In these latter cases the court will not permit a person to be victimized but will give him relief according to the circumstances of each particular case.

Contracts Made on Sunday.—*d.* Agreements made on Sunday are illegal because the law generally forbids labor on that day, and the making of secular contracts is considered "work and labor." However, an executory contract whose object is to benefit religion or charity will be enforced by the courts, even though made on Sunday. Again, contracts may be made on Sunday whose object is to preserve life, health or property. And finally, where a contract has not only been made but executed on Sunday, the courts will not interfere.

Usury.—*e.* In most States a legal rate of interest is established by statute. Interest paid in excess of this rate, at the option of the borrower, may be recovered; or if unpaid, may be deducted from the amount of the debt.

The law does not include pawn brokers and certain other contractors who may charge a higher rate.

Contracts Against Public Policy.—2. Agreements which are detrimental to the health, safety or morals of a community are void since they are against public policy. Thus an agreement not to prosecute a crime is void; or an agreement in restraint of marriage or of marital relations is void. The common sense of the community is the best standard by which to measure the legality of these agreements.

Contracts in Restraint of Trade.—The largest class of agreements which are opposed to public policy is one out of which great litigation has arisen, *i. e.*, agreements in restraint of trade. These will be explained in a subsequent lecture.

Illegal Object Contracts in Court.—It is a general rule that the courts will not recognize an agreement whose proof discloses an illegal object; therefore money or property transferred under such an agreement usually cannot be recovered, but there are exceptions to the rule:

Remedies.—1. The court may compel the refunding to the less guilty party of the money paid by him under a contract having an illegal object where the parties are not equally to blame; for instance, he who frames a scheme is more guilty than he who succumbs to the temptation to profit by it.

2. Where the illegal transaction is executory, either party may repent and invoke the same remedies he would have had if fraud had been practised upon him, except that he cannot sue in deceit.

3. As said before in discussing gambling contracts, the repentant gambler may recover the money remaining in the hands of the stake-holder; and if the stake-holder pays it over to the winner after receiving notice not to do so from the loser, the stake-holder is himself liable for the amount he paid after he had received such notice.

VII

ESSENTIAL PARTS OF CONTRACTS

LEGAL FORM

Statute of Frauds.—The Statute of Frauds is an English law adopted in practically every American state. It provides that certain contracts shall be in writing, otherwise the courts will not enforce them. The reason for the Statute is to prevent fraud and perjury in proving these agreements.

Contracts Which Must Be Written.—The following list of contracts which are embraced by the Statute demonstrates the necessity for requiring them to be written:

1. Contracts for the sale of real estate.

2. Contracts for the letting of real estate for a period of three years and upwards.

3. Contracts of surety and those where an executor or administrator agrees to be personally liable for the debt of his decedent.

4. In some states, contracts for the sale of merchandise in excess of a certain amount. In Pennsylvania, by Act of Assembly approved in May, 1915, this amount was fixed at five hundred dollars and upwards. In New Jersey the amount is thirty dollars.

5. Trusts created upon lands.

Kind of Writing Required—Effect of Possession.—The written agreement which the Statute re-

quires need only be a memorandum but must be signed by the party sought to be charged. Thus a letter acknowledging the obligation is sufficient to satisfy the law. Again, a delivery or even a partial delivery of goods or of possession are sufficient to satisfy the Statute.

Reasons for Statute of Frauds.—Transfers of real estate always having been guarded with jealous care, the law requires that agreements for that purpose shall be written. The other contracts included in the Act afford opportunity for such perjury that courts and juries would be vexed by problems which they could not solve if the law permitted oral testimony to be given.

VIII

ESSENTIAL PARTS OF CONTRACTS

COMPETENT PARTIES—FEME SOLE TRADERS

Presumption of Competency — Incompetents.— The law presumes all persons able to contract, but while this is generally true, certain persons, because of their age, condition or position in life, may be readily excluded from the presumption. To be sure, they may make some contracts in order that they may live as human beings; but to permit them to contract under the presumption would be to expose them to shrewd and designing persons who would take their property from them under the guise of "voluntary" agreements. These persons, therefore, are said to be under disability and are:

1. Infants.
2. Persons unsound mentally.
3. Drunkards.
4. Alien enemies.
5. Married women to a limited extent.

As mentioned above, even these persons may make contracts for necessaries such as food, clothing, shelter, medical attendance and education. What is necessary for a particular person depends upon that person's station in life. What would be a luxury for A might be a necessity for B; and if it were a necessity B would have to pay for it even though he was under a disability.

Reasons for Law.—Infants, drunkards and persons mentally unsound are protected by law in this way because they are not able to help themselves. Alien enemies are included because to contract with them might very well amount to treason. Married women are protected by law against the persons who are their natural guardians, namely, their husbands; and those persons to whom their husbands are indebted. Consequently, a married woman cannot be a surety for anyone and strictly speaking she cannot become bail to release her husband from prison. Nor can she mortgage her separate real estate without her husband's signature, while he can mortgage his separate property without her signature. Since neither husband nor wife can sell their separate real estate without both signatures, the wife's inability to do so can hardly be considered more of a disability than her husband labors under; and a man's inability to convey his real estate free and discharged of his wife's dower is not considered to be a disability.

Removal of Disability.—When the period of disability has ended any of the persons classified above may affirm their contracts made while they were incompetent. Any act showing an intention to be bound by the contract will affirm it. If no affirmation is ever made the agreement remains unenforcible.

Disability Sometimes an Illegal Defense.—If a person under a disability tries to retain goods and yet evade paying for them under claim of disability, the creditor may recover his goods either by civil or criminal process.

FEME SOLE TRADERS

Reason for Law.—A feme sole trader is a married woman who has engaged in business or trade in order to support herself because her husband has gone to sea, or because he is a drunkard or profligate, or because for any other reason he has deserted her and refused or neglected to support her.

Reason for Proceedings Thereunder.—To protect creditors, the married woman must have been adjudged a feme sole trader upon petition to the Court of the County wherein she is conducting her business or trade, for although she can claim some of the benefits of the law without such formality, her creditors in such case cannot levy upon her property for the payment of debts contracted by her in the course of trade.

Effect of Decree.—The law further provides that during the lifetime of her husband, a married woman can sue and be sued on contracts made for her business or trade, and (when she has been adjudged a feme sole trader by the court) her creditors can levy upon her individual property for settlement of their claims against her. Lastly, it is provided that she shall have sole power to dispose of her property, both real and personal, either by deed or by will; and in case she dies intestate, her property shall go to her next of kin as though her husband were already dead.

IX

DISCHARGE OF CONTRACTS

A CONTRACT is discharged when the parties to it are freed entirely from their rights and liabilities under it. Contracts may be discharged in the following ways:

1. By mutual agreement.

2. By performance of all obligations by all parties to the contract.

3. By impossibility of performance.

4. By breach of one of the parties to the contract.

Mutual Agreement.—1. Since the parties to a contract voluntarily enter into it, so they may mutually agree to excuse each other from doing the things agreed upon. There are three ways in which contracts are discharged under this heading:

a. By waiver, cancellation or rescission.

b. By substituted agreement.

c. By the happening of some condition expressed or implied in the original contract.

a. Where there is an express agreement by the parties that the contract shall no longer bind either one, it is said that such contract is discharged by waiver, cancellation or rescission. It should be carefully noted that in order to discharge a contract by any of these methods, there must be, with certain exceptions, a consideration given to support such cancellation. The exceptions are where the contract is wholly executory, that is, where nothing has been done by either party under

the terms of the contract; where the instrument cancelling the agreement is under seal; and where a negotiable instrument which is the subject of the contract has been destroyed or surrendered for the purpose of discharging the debt.

b. Where the existing contract is discharged by the substitution of another agreement, the substituted agreement may consist of a new contract expressly substituted for the old one; or of a contract inconsistent with the old one; or of a new contract made up of new terms and so much of the original as remains unchanged; or of a contract in which a new party is substituted for one of the original parties.

c. By condition in the contract. A contract may be discharged by the happening of a certain event agreed upon by the parties; or where one of the parties has the option to determine the contract at will.

Performance.—2. Where both parties have performed all obligations imposed by the contract, it is then discharged. On the other hand, full performance of his obligation by one of the parties discharges him alone, but does not discharge the other party; and the latter must still perform his obligation or else be liable in damages therefor; and in some cases he may be made to perform specifically where there is no adequate remedy at law. Whether all the terms have been fulfilled is a question to be determined upon the facts of each case.

Substantial Performance.—Note that exact performance of the contract by the parties is not absolutely necessary for the discharge of it; in some cases the contract can be discharged by what is termed sub-

stantial performance. But here the contractor must deduct from the original amount of his bill whatever sum of money such variation from exact performance is reasonably worth to the other party.

Offer to Perform as Prerequisite to Damages.—Ordinarily the honest contractor needs no guide for the performance of his agreements. But sometimes, where the other party refuses to carry out his part of the agreement and this refusal is known to the honest contractor before the time for his own performance has arrived, a tender or offer of performance must be made by the latter in order to prepare a case for court. How this tender of performance should be made is a question for a lawyer.

Payment.—Frequently the performance contemplated under a contract is payment. This may consist of currency—either coins or paper money; the personal paper—note, check or draft—of the debtor; or the personal paper of a third party.

Legal Tender.—Usually the creditor may select the medium which he is willing to accept in payment. However, the Federal Government by the Legal Tender Act has specified certain media which the creditor must accept. These media are known as legal tender and are defined by the Act as follows:

1. Gold, and silver dollars to any amount.
2. United States and Treasury notes to any amount.
3. Silver fractional currency to an amount not exceeding ten dollars.
4. Nickel and copper coins to an amount not exceeding twenty-five cents.

Gold and silver certificates and national bank notes,

while not legal tender under the Act, generally have been received as such since the resumption of specie payments. Federal Reserve Notes are receivable for debts due the United States and are legal tender among member banks. The various kinds of paper money issued by the Government and by the national banks bear printed conditions limiting their use when payments are made to the Government itself.

Payment Not in Currency.—Except as above set forth the creditor may select his own medium of payment. If he accepts the personal paper of the debtor there is no real payment until that paper has been cashed or turned into money of the United States. But if the creditor accepts the personal paper of a third person, by indorsement of his debtor, it is payment or release of the original debt, even though the instrument itself is not paid when presented.

Debtor's Duty to Offer Payment.—It is the duty of the debtor to seek out his creditor and offer or tender payment at the proper time.

Refusal of a Receipt.—The creditor need not give a receipt unless a statute or the contract itself so provides. It is customary, however, for the creditor to give a receipt which may be used later as proof of payment. Refusal to give a receipt is not ground for refusal to pay the debt, however, except as stated above.

Refusal of Offer to Pay.—Where the debtor has made a legal tender or offer of payment which is refused by the creditor, the latter cannot afterwards recover more money than was due him upon the day when the tender was made; but the debt is still due.

X

DISCHARGE OF CONTRACTS (CONTINUED)

Impossibility of Performance.—3. Sometimes a contract is discharged because it is impossible to perform it. The following are causes which may render performance impossible in some cases:

a. Act of God.

b. Operation of law.

Acts of God.—*a.* There are various definitions of an act of God, but for our purposes an act of God may be said to be an inevitable accident produced by the elemental forces of nature which human judgment could not have foreseen nor human skill prevented. The essential thing to be remembered is that the act which has prevented performance of the duties imposed by contract must be an act of God, usually making itself felt through some violent force of nature; and not some impossibility caused by man. Some manifestations of nature that have been held to be acts of God are fires caused by lightning; unusual snow storms preventing transportation of commodities and passengers; unusual rains, floods and hurricanes.

Insurer's Contract.—However, it should be remembered by the student that if a person, by his contract, imposes an absolute liability upon himself to do a certain thing, without qualification, he is bound to do it or answer for his breach, no matter what may be the cause of the impossibility; and this is true even where

he has been prevented by an act of God from performing his contract.

Operation of Law.—*b*. A contract is discharged if the law makes it impossible of performance. But if, after performance of his contract-duty by one of the parties, the performance of the other, who insists upon retaining the benefits which he has obtained under the contract, is forbidden by law, then a court will require that the latter pay an equivalent in money to compensate him who has performed.

Impossibility of performance by act of the parties is practically "breach" and will be treated under that topic.

Breach.—4. A contract is discharged by breach when one of the parties to it breaks an obligation which it imposes upon him. This may be done in any one of the following ways:

a. He may disclaim all liability under it.

b. He may render it impossible to perform the contract.

c. He may partially or totally fail to do what he has undertaken.

Unfair Bargain No Legal Basis for Breach.—*a*. A business man should know that once he has entered into a valid contract with another he cannot absolve himself from liability under it by a mere refusal to perform the obligations it imposes upon him. To do that he must first obtain the consent of the other party. Thus one who contracts in a *bona fide* way, merely because he has received the worst of the bargain, cannot decide that he will not go on with it and expect to be

freed from liability. This is a breach of contract and the injured party can recover damages for any loss he may sustain. However, if one does so disclaim liability, the contract is discharged by breach and the other party can immediately sue for the damages he suffers.

Impossibility of Performance Caused by Breach. *b.* Where one of the parties by his acts or omissions makes performance of the contract impossible, it is immediately discharged by breach and the injured party can sue for damages. Further, it should be carefully noted that the act or omission does not have to be malicious. Thus, where X contracted with a partnership to serve as its agent for a term of five years and the partnership terminated at the end of two years, since performance of the contract was rendered impossible by reason of dissolving the partnership, the agent was allowed to recover his salary for the full term of five years. Here there is no malice shown—only an apparent *bona fide* act of the partnership—and yet the partners were held liable for the damages.

Dependent and Independent Promises.—*c.* As a general rule it may be said that when one of the parties fails to perform any of the terms of the contract, the contract is broken just as soon as this occurs. There is a certain limitation to this in that the mutual promises must be conditional or dependent upon each other. Thus there is no discharge of a contract upon simple non-performance of independent contracts or promises even though these promises are made at the same time. In other words, the old saying that "two wrongs will never make a right" holds good. The fact that one

of the parties has refused to do what he has promised to do does not permit the injured party to refuse performance of his own agreement; at least the injured party must make a tender of performance, as stated before.

Partial or Total Failure to Perform.—Partial failure of performance is the commonest kind of breach. Few of us have the courage to break our agreements outright; but we make a half-hearted effort which results in partial failure of performance—sometimes complete failure, too. Poor workmanship, or an unlawful desire to save money or trouble, are the chief causes of faulty performance, which amounts to partial failure.

XI

JOINT AND JOINT AND SEVERAL CONTRACTS

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

Definitions.—The word "joint" as applied to contracts means that several persons have undertaken to perform together, each agreeing to do part only; and the word "several" as applied to contracts means that several persons have agreed among themselves that each shall complete performance by himself if necessary. Therefore, a joint contract may be briefly defined as one in which two or more parties on one side have agreed jointly with one or more persons on the other side, each party to do only his own particular share of the performance.

On the other hand, a joint and several contract is one where there are two or more parties on one side, each of whom may be required to complete performance himself, irrespective of his own separate agreement with his fellow-obligors.

Disadvantages of Joint Contracts.—The practical objection to a joint obligation is that he who may demand performance must first satisfy a number of persons who in return need only yield him a share of performance. Thus in a suit on a joint contract, the joint-contractors must be joined as defendants. If one of the joint-obligors pays the amount of the judgment

taken against all, he may recover from his fellow-obligors the amount of their respective shares. This is called the right of contribution. If one of the joint-obligors is released from liability the others are also released, except where the release was given in consideration of the performance of the joint-obligor's proportionate share.

Joint and Several Contracts.—A joint and several contract is not so intricate. One of the obligors, being himself liable for the whole performance, may be selected as the defendant; and he will be liable to pay the entire amount of the judgment. If he has any right of contribution against his co-obligors it does not depend upon the joint and several contract, but upon some collateral agreement. Nor does a release of one of the obligors discharge the obligation of the others unless such release would take from them the defense they would otherwise have had. Furthermore, the plaintiff may continue to sue each obligor individually until he has received full satisfaction. A joint and several obligation is a contract benefiting the plaintiff, while a joint contract holds more advantages for a defendant.

Procedure Simplified.—By various statutes some of the distinctions between joint and joint and several contracts relating to procedure have been abolished. An instance of this effort to simplify the law will be noticed later in the lectures on Bills and Notes.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

Only Parties May Sue Upon a Contract—Exceptions.—At common law the rule was that no one but a

party to a contract had any right to sue upon it. This is the rule followed to-day, but it has two well-recognized exceptions:

1. Where a person has agreed to pay another's debt and has received the funds or property wherewith to pay, that is, where there has been a trust relationship created; and

2. Where a partnership or other business has been purchased by one who has agreed to pay the firm debts and who has received the assets of the business wherewith to pay.

In either case the beneficiary or creditor may sue him who holds the fund, although the former is not a party to the contract made for his benefit.

XII

SALES OF PERSONAL PROPERTY

Sales are Special Contracts.—The law pertaining to sales of goods is a branch of the law of contracts; consequently, all the rules of law relating to contracts apply equally to sales of goods.

Vendor and Vendee.—He who sells the goods is known as the seller or vendor and it is his duty to deliver the goods in accordance with the terms of the contract. He who buys the goods is called the buyer or vendee and it is his duty to accept the goods and to pay the agreed consideration or price for them. The price may be expressly agreed upon or be fixed by the course of business or may be a reasonable one under all the circumstances.

Difference Between Sales and Contracts to Sell.—It is important to observe the distinction between sales and contracts of sale. Thus a sale of goods is the transfer thereof in consideration of an agreed price; whereas a contract to sell goods is an executory agreement. In other words, the sale is the consummation of the contract to sell. In determining whether there has been a sale or only a contract of sale, delivery of the goods plays an important part.

Method to Determine Difference.—Where the goods have actually been delivered to the vendee with intent to pass title to him, the transaction is a sale; but where delivery has been made to an agent, such as a car-

rier, there may or may not be a sale, depending upon the terms of the contract, usages of trade or other facts which will be noted later on.

Installment Leases.—In some states chattel mortgages—mortgages upon personal property—are impracticable; instead, installment leases are used. Under this type of contract, A leases to B an article of personal property, such as a sewing machine, B to pay rent therefor until the installments of rent amount to a certain sum, when A becomes bound to deliver title or ownership of the article to B. But until the last installment of rent is paid, A remains the owner of the article.

Potential Goods May be Sold.—Since the term "personal property" includes intangible as well as tangible property, both are subject to sale; nor need the goods actually exist at the time the contract to sell them is made; thus, goods which have a potential existence, *e, g.,* crops which a farmer expects to reap at the next harvest, may be sold.

When Title Passes.—The most important consideration in sales is when title to goods sold passes from the vendor to the vendee; for ownership of the goods carries with it two of the most important attributes of property, namely, risk of loss and the right of resale. The question of passage of title is decided by reference to the intention of the parties, and to understand their intention we must examine their conduct, the terms of the contract, usages of trade and the particular circumstances of the case.

Fungible Goods.—There is a general rule that no title can pass to the buyer until the goods have been

ascertained; but there is an exception in the case of fungible goods. Wheat, liquids or other goods, any component part of which is the same as the general mass, are known as fungible goods; and any definite number, weight or measure of these goods in mass may be sold and title thereto pass to the vendee even though the part sold is not separated from the general mass. The vendee becomes an owner in common of the mass.

There are a number of rules relating to this question of passage of title, which are useful in determining the intention of the parties, but they require too much space for discussion here.

Kinds of Sales—Definitions.—There are various kinds of sales and contracts of sale as follows:

1. Absolute.
2. Conditional.
3. For cash.
4. On credit.
5. By sample.
6. By description.
7. At a valuation.

1. An absolute sale or contract to sell is one which is free of all conditions.

2. A conditional sale or contract to sell is one whose consummation depends upon a contingency.

3. A cash sale or contract to sell is one in which delivery of the goods and payment of the price are simultaneous acts.

4. A credit sale is where the goods are delivered and title passes but payment of the price is deferred.

5. A contract to sell by sample is where it is agreed that a larger quantity of goods shall be delivered whose

quality shall approximate that of the sample shown when the contract of sale was made.

6. A contract to sell by description is similar to a sale by sample except that no sample is exhibited, the sale being made from a catalog, etc.

7. A contract to sell or a sale of goods may be made upon prices or terms fixed by a third party. This is called a sale at a valuation.

XIII

SALES OF PERSONAL PROPERTY (CONTINUED)

CONDITIONS AND WARRANTIES—REMEDIES

Difference Between Conditions and Warranties.—At common law there was a distinction observed between conditions and warranties in that the buyer might reject goods sold upon condition but was obliged to accept them if sold upon a warranty, on the theory that while a condition was a part of the sales transaction, a warranty was merely a collateral agreement; but the law now appears to give a buyer the right to treat warranties as conditions and to return goods which have been guaranteed or warranted under collateral agreements.

How to Determine Difference.—Conditions of sale are usually expressed or arise through the custom of the trade. Warranties may be both expressed and implied. If they are expressed they are what we know as guarantees—" these goods are fast black and will not shrink." But there are various implied warranties such as warranties of title and that goods will equal description and sample.

Place of Delivery of Goods.—If the contract of sale is silent upon the subject and there is no usage of trade to the contrary the place of delivery of the goods sold is the seller's place of business, unless to the knowledge of the parties contracting, the goods are at some other place; in the latter case this other place is the place of delivery. If the goods at the time of the sale are in

the possession of a third person, the seller must procure acceptance of the contract of sale by such third person.

Right to Examine Goods.—When goods are delivered to the vendee which he has not previously examined he must be given a reasonable opportunity to examine them. If he fails to communicate to the seller his acceptance of the goods, any act of the buyer which is inconsistent with the ownership of the seller amounts to acceptance; thus keeping them an unreasonable length of time or using them or part of them may be construed as an acceptance of them.

REMEDIES OF THE PARTIES

A. Of the seller:

As in all contract cases the law provides a remedy for breach. Thus if the seller is not paid his price he may:

1. Hold the goods till the buyer pays the price. This is known as a seller's lien.

2. Re-sell the goods and recover from the buyer damages for any loss occasioned by the breach.

3. Rescind the sale and resume property or ownership in the goods and may then recover damages from the buyer for any loss occasioned by the breach.

4. If the buyer becomes insolvent the seller may stop the goods in transit; that is to say, even though title to the goods has passed to the buyer the seller may order the carrier not to deliver them to the buyer.

5. Where title has passed to the buyer the seller may sue for the price; or for such damages as he sustains by reason of the non-acceptance of the goods.

B. Of the Buyer:

1. If the title to the goods has passed to the buyer he may bring suit against the seller for wrongfully withholding the goods. The action of replevin is the usual remedy adopted.

2. He may bring action for damages for failure to deliver the goods, or

3. If the goods are of a special nature he may file a bill in equity asking for specific performance upon such terms as the court may decree.

4. Where there is a breach of warranty he may at his option sue for damages, retaining the goods; or may return the goods as though the warranty were a condition.

Measure of Damages.—In all cases where there is a suit for damages by either seller or buyer the damages are measured by the difference between the agreed price and the market price; but if there is no market price because of the special nature of the goods the seller may recover the agreed price and the buyer may bring replevin or ask for specific performance. Sometimes special damages, which naturally result from the breach, are added, such as freight and storage charges or loss occasioned by spoiling or deterioration of the goods.

Market Price.—The market price spoken of above means that price which obtained in the open market at the time when the goods were to be delivered.

Creditors of the Parties.—There are a great many special rules relating to the rights of creditors of the buyer and of the seller, but since creditors' rights cannot rise higher than those of the owner of the goods a determination of the question of ownership will determine the rights of creditors.

XIV

ASSIGNMENTS

COMPARISON BETWEEN ASSIGNMENT AND NEGOTIATION

Intangible Property—Choses.—In previous lectures, sales or transfers of personal property—tangible property—have been discussed; in future lectures sales or transfers of real property—lands and buildings—will be discussed. In addition to tangible personal property we have rights of property which cannot be sensed, that is to say, which are intangible. Among these intangible rights are those called "choses in action." When they are being enjoyed, they are called choses in possession.

Definition of Chose.—A chose in action may be briefly defined as that right of personal property which one person may assert against another and which, although intangible, has the attributes of other personal property in that it may be bought and sold. A chose in action may be evidenced in writing, or it may be evidenced by facts susceptible of proof.

Methods of Transferring Chose.—Choses in action may be transferred in one of two ways:

1. By assignment.
2. By negotiation.

And which method of transfer or sale shall be used is a question to be decided by reference to the evidence of the chose. Thus if the evidence is a writing and that writing complies with the requirements of the law of negotiable instruments, the chose is transferable by negotiation.

Transfer by Assignment.—An assignment of a chose, like the negotiation of it, is the transfer of the rights of ownership from one person called the assignor to another called the assignee. The rights of a contractor are really choses in action and the law of assignment is peculiarly applicable to the transfer of contract choses. Contract rights are generally assignable except those which involve personal credit, skill or such relationship of trust and confidence as would render the substitution of another highly undesirable to the original contractor. But contract liabilities are unassignable without the consent of the obligee.

Form of Assignment.—No special form of assignment is necessary, though it is usual to put assignments in writing and sometimes they are sealed and witnessed as well.

Since an assignment is in itself a contract, it follows that it must contain all of the elements of contracts described in previous lectures, such as consideration, etc.

Caution.—He who is about to purchase by assignment should be sure to see the evidence of the right which is to be transferred to him; and immediately upon consummation of the transfer he (the assignee) should notify the principal debtor that he has bought the chose. He may also secure from the latter a declaration of no set-off.

Effect of Assignment.—The effect of an assignment is peculiar in the following ways:

The assignor who attempts by his transfer to wipe out his own liability cannot succeed in doing so, that is to say, if his assignee fails to perform, the assignor must do so. The only way he can escape such liability is to

secure a release from his co-contractor, who thereby accepts the assignee to the exclusion of the assignor. This in law is known as a novation.

Difference in Result of Assignment and Negotiation.—The assignee is precisely in the same position as his assignor. It is said that he "stands in the latter's shoes." Consequently any defense or set-off which was good against the assignor would also be good against the assignee; and this is true irrespective of the good faith or lack of knowledge of the assignee. Please note carefully that this is the most important difference between assignment and negotiation.

Caution.—It is well for the assignee to secure whatever evidence of the chose that exists. Thus if there is a writing the assignment should be noted on the back or attached thereto and then all the papers should be transferred to the assignee. This is similar to delivery in negotiation.

Assignment by Operation of Law.—So far we have considered assignment as a transfer by act of the parties. Sometimes property rights are transferred by operation of law, as by death and bankruptcy. Thus when a man dies his outstanding contracts, unless they are for personal services, are transferred to his executor or administrator; and in bankruptcy the choses in action of the debtor are transferred to his trustee for the benefit of his creditors.

COMPARISON BETWEEN ASSIGNMENT AND NEGOTIATION

The two may be compared in three ways:

1. Their purpose.

2. Their method.
3. Their effect.

Purpose of Transfers.—The purpose of both is the same, namely, to transfer a right or chose to another, usually with the ultimate purpose of paying a debt.

Method of Transfers.—The method of assignment was explained above, usually consisting of a separate contract, sometimes sealed and witnessed; negotiation, on the contrary, consists of delivery of the chose in the form of a bill or note, if it is a bearer instrument; or by first indorsing it (writing one's name on the back), if it is an order instrument, and then delivering it to the transferee. The reason why the law permits this easy method of transfer is because negotiable instruments are treated legally and commercially as the equivalents of paper money; and the truth of this statement is proved by the fact that if a negotiable instrument loses its character as such, it also loses its method of transfer. In other words, when it can be no longer transferred by indorsement and delivery or by delivery alone, it may be transferred by assignment.

Result of Transfers.—But, as said before, the chief difference between assignment and negotiation is that while the assignee can never receive a better right than his assignor had, his good faith being immaterial, the holder by negotiation, if he took in good faith as defined in Section 52 of the Uniform Negotiable Instruments Act, may take a better title and more rights than his indorser had. Under the Section of the Act referred to, the transferee may be a holder in due course, not subject to any defenses existing between the original parties except forgery.

XV

BILLS AND NOTES

ESSENTIALS OF NEGOTIABLE INSTRUMENTS FORM OF THE CONTRACT EXPLAINED

The best way to learn about bills and notes, or negotiable instruments as they are sometimes called, is to read the Uniform Negotiable Instruments Act in which the whole law upon the subject is codified. But since time forbids such an exhaustive study of the law, the following analysis of the Act has been prepared.

Essentials of Negotiable Instruments.—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money.

3. Must be payable on demand or at a fixed or determinable future time.

4. Must be payable to order or to bearer, and,

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Explanations of the Essentials.—A sum certain is such although it is to be paid with interest, in installments, with exchange, with costs of collection, or with an attorney's fee.

There must not be an order or promise to do any-

thing in addition to paying money; but the following collateral agreements do not affect negotiability:

1. Authorizing the sale of collateral security.
2. Confessing judgment.
3. Waiving the benefits of the exemption laws.

The negotiable character of the instrument is not affected by the presence of a seal, by omitting the date, by omitting the words "without defalcation, value received," by omitting the name of the place where drawn or payable, or by specifying the particular kind of money with which payment is to be made.

Who May be Payee.—The instrument may be made payable to anybody, even though his name already appears on the instrument in another capacity; to one under a disability; or to the holder of an office for the time being, such as "treasurer" or "prothonotary."

When Instrument is Payable to Bearer.—The instrument is payable to bearer when so stated on its face or when the last indorsement is in blank (a blank indorsement is the signature only of the transferror.)

Authority to Complete Instrument.—Where the instrument is incomplete, the holder may complete it if he acts strictly in compliance with his authority, express or implied. If he abuses his authority he derives no advantage therefrom if he holds the instrument at maturity; but in the hands of a holder in due course the instrument is as good as though it had been properly completed. No one, however, may complete an instrument by adding another's signature.

Rules of Construction in Cases of Ambiguity.—When the language of the instrument is ambiguous, these rules of construction are followed:

1. Words control figures, but if the words are illegible, figures control.

2. Writing controls printing.

3. An instrument reading "I promise" signed by two or more persons, is a joint and several obligation.

4. One who signs a trade name makes himself liable as though he had signed his own name.

Signature by Agent.—The signature of anyone as maker, drawer, acceptor and indorser may be made by an agent. The right of the agent to sign his principal's name is usually derived from a power of attorney, although any form of authority may be used. While no particular form of signature is necessary it should disclose the name of the principal; otherwise the agent is individually liable.

Incompetents Not Liable as Indorsers.—Those under a disability may transfer title to a negotiable instrument, but are not liable thereunder.

Forgery.—Forgery of the maker's or drawer's name is an absolute defense to all parties on the instrument itself, for in contemplation of law, such an instrument never existed. Those who have become parties to it subsequently and in good faith have their right against each other as it existed before they took the alleged instrument; in other words the instrument is counterfeit money. If an indorser's name is forged, no right to retain the instrument or to enforce payment thereof against any party thereto can be acquired thereon under such signature, unless the party defendant is precluded from setting up the forgery by some act of his own.

Consideration.—Legal value or consideration necessary to support a negotiable contract means the same as

those terms mean in ordinary non-negotiable contracts. Absence or failure of consideration is a defense against any person not a holder in due course, and partial failure of consideration is a defense pro tanto (which means for so much).

Accommodation Party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor and for the purpose of lending his name and credit to some other person. He is liable to the holder for value even though the latter knew when he took the instrument that the former was only an accommodation party. The fact that he is an accommodation party is, however, a defense against the accommodated party.

XVI

BILLS AND NOTES (CONTINUED)

EFFECT OF NEGOTIATION—INDORSEMENTS

Results of Negotiation.—In considering the act of negotiation the student should bear in mind that three objects are effected as follows:

a. Title to the instrument is transferred.

b. The law imposes upon the transferror (indorser) a duty to pay the instrument unless he has himself, by a peculiar kind of indorsement called a qualified indorsement, eliminated this liability.

c. A receipt may be delivered.

Kinds of Indorsements.—The following are the principal kinds of indorsements:

Blank.—1. The name only of the transferror, called blank indorsement.

Special.—2. The name of the transferee as well as that of the transferror, called special indorsement, because it specifies the payee.

Restrictive.—3. An indorsement which prohibits further negotiation of the instrument or constitutes the indorsee an agent or trustee, is called a restrictive indorsement. But the mere absence of words of negotiation does not make the indorsement restrictive. Thus "Pay to John Brown (signed) W. Smith" is not restrictive; whereas "Pay to John Brown only (signed) W. Smith" is restrictive.

Qualified.—4. Qualified indorsement, effected by

adding to the indorsement the words "without recourse," while passing title to the instrument, eliminates the indorser's liability. This kind of indorsement is valuable for agents or those persons who wish to indorse an instrument without incurring liability thereon because they do not receive any benefit from it.

Conditional. — 5. The conditional indorsement means a transfer upon condition. It is well to remember that while the contract upon its face must be unconditional in order to be negotiable, yet the transfer of it may be upon any condition which the holder seeks to impose. The following illustration will make the matter clear:

Illustration of Conditional Indorsement.—A United States note for five dollars is the unconditional promise of the Government to pay the holder thereof five dollars, and since it is a bearer instrument it requires no indorsement; yet A could deliver this note to B upon any oral condition that he sought to impose. It follows, therefore, that if the condition can be written upon the back of an order instrument, its transfer also may be affected thereby.

Negotiable Instruments as Receipts.—In addition to transferring title and imposing liability upon the indorser, the indorsement may indicate payment and as receipts negotiable instruments are frequently offered in evidence in law suits.

Negotiation to Prior Party.—Where an instrument is negotiated back to a prior party the latter may re-issue or further negotiate it; but he cannot enforce payment thereof against intervening parties to whom he himself is liable.

Delivery More Important Than Indorsement.— It is well to remember that the delivery of the instrument is more important than its indorsement. If the instrument has been transferred without the indorsement which it requires, the transferee acquires a right to compel his transferror to indorse it; but until delivery, the instrument, even though specially indorsed, will give the intended transferee no right whatever.

Who May Sue—Who May be Sued.—The holder of a negotiable instrument may sue thereon in his own name. He may sue the maker, acceptor, drawer or any prior indorser to whom he himself is not liable. Payment to the holder satisfies him and the instrument becomes the property of him who paid it, he in turn being subrogated (that is, substituted) to the rights of the former holder as against any person who is liable to the present holder. In other words, indorsers have recourse against their predecessors in title only and not against those who take subsequently.

Order in Which Indorsers are Liable.—If there are five indorsers on an instrument, the holder may select any one of the five or the maker and compel him to pay who is selected. Thus if the holder compelled indorser number two to pay, the latter could have the instrument and proceed against indorser number one or against the maker, but not against indorser number three or indorser number four.

Indorser's Liability Conditional. — Subsequent lectures will show that to fix the liability of any indorser the holder must present the instrument to the maker, demanding payment; and upon the latter's refusal or failure to pay, the holder must notify any in-

dorser whom he intends to hold liable. Failure to present to the maker for payment and failure to notify any indorser of dishonor will discharge the indorser.

Holder in Due Course—Section 52 of the Act should be committed to memory. It is as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular on its face.

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

When Title is Defective—The title of a person who negotiates an instrument is defective when he obtains it or any signature thereto by fraud, force, fear or other unlawful means; or for an illegal consideration; or when he negotiates it in breach of faith or under such circumstances as amount to fraud.

Notice of Infirmity—Notice of an infirmity under Section 52 means actual knowledge or such means of knowledge that taking the instrument amounts to bad faith. If a holder is not one in due course he is subject to these defenses as though the instrument were non-negotiable.

Holder Presumed to be "In Due Course."—Every holder is deemed to be a holder in due course until the contrary is shown.

XVII

BILLS AND NOTES (CONTINUED)

CONTRACTS OF THE PARTIES ANALYSED

Parties to a Negotiable Instrument.—The person who signs an instrument at the lower right-hand corner is called the maker or drawer, depending upon whether the instrument is a promissory note or draft. The name which first appears on the instrument usually indicates the payee or person who is to receive the money. The name in the lower left-hand corner designates the drawee or person who is to pay the money. A check, which is similar to a draft, generally bears the name of the drawee in print above the name of the payee. Those persons whose names appear on the back of the instrument are called indorsers; and if there is not space enough upon the back of the instrument to accommodate the names of all the indorsers, a slip of paper—called an allonge—may be attached to the instrument to be used for additional indorsements. If a person signs his name upon an instrument and it is not clear in what capacity he has signed, he is deemed to be an indorser.

Contract of Maker—of Drawer.—The maker of a promissory note promises to pay it. The drawer of a draft engages that on due presentment the instrument will be accepted or paid and that he will pay if the instrument be dishonored by non-acceptance or non-

payment. The liability of a maker is absolute and no steps need be taken to complete it; the liability of a drawer is conditional upon the proper proceedings being taken for dishonor.

Contract of Drawee.—The drawee incurs no liability until he accepts; thereafter he is treated as a maker.

Contract of Indorser.—The indorser engages that he will pay the instrument if the maker or drawer fails to pay, provided proceedings in dishonor be duly taken.

Effect of Indorsing Bearer Instrument.—Where a person indorses an instrument negotiable by delivery alone—a bearer instrument—he incurs the liability of an indorser. Joint payees who indorse are deemed to indorse jointly and severally.

Indorsement Transfers Entire Instrument.—An indorsement transfers the entire instrument, that is, no indorsement can transfer part of the amount of the instrument to one indorser, withholding the balance; nor can the amount of the instrument be divided by indorsement among several payees. Of course, as indicated above, the instrument may be reduced by part payment and remain negotiable as to the balance yet due.

Receipts for Part Payments.—One who is liable upon an instrument and who pays part thereof should take the precaution of having the sum paid noted upon the back of the instrument; otherwise, while he may hold the receipt of the creditor, the instrument is collectible to the amount on its face if it is further negotiated to a holder in due course. At this point it might be well to say that as between immediate parties to an

instrument any defense which would invalidate an ordinary contract is good; but as between remote parties (those having no immediate relation through the instrument) these personal defenses are worthless, unless the remote parties have knowledge of them.

In the following summary, proceedings upon dishonor are explained respecting dishonor for non-payment, but the rules laid down are substantially the same as those governing dishonor for non-acceptance.

Proceedings Necessary to Charge Indorsers.— Proceedings for dishonor include three separate steps:

1. Presentment to the maker for payment.

2. Notice to the indorsers of non-payment or dishonor.

3. In the case of a foreign bill only, protest before a notary public. (It is true that it is customary to protest domestic bills as well, but the law does not require protest except in the case of foreign bills.)

XVIII

BILLS AND NOTES (CONTINUED)

PRESENTMENT FOR PAYMENT
NOTICE OF DISHONOR

First Step is Presentment for Payment.—Presentment for payment to the maker is the first step to charge indorsers; unless an instrument is presented for payment, they are discharged from liability. No presentment is ordinarily necessary to charge a maker but if a place for presentment is specified in the instrument and the holder fails to present the instrument there, upon suit brought, the maker need not pay more than he would have had to pay on the day of presentment. In other words, he need not pay costs of suit nor interest from the day fixed for presentment.

Where Made.—Presentment shall be made at the place specified in the instrument, or, if none be specified, at the place of business of the maker; or, if none, at his place of residence; or, if none, where he can be found; and if he cannot be found, presentment is excused.

To Whom Made.—Presentment shall be made to the maker; or if he is not present, to an adult person associated with the maker. Or if the maker is dead, to his personal representative—executor or administrator.

If Presented at Bank.—Presentment at a bank, when authorized by the maker, is a direction to the bank to pay. The person paying an instrument has a right

to its physical possession and the holder shall surrender it to him.

When Presentment Shall be Made.—Time instruments shall be presented on the due date, which is ascertained by excluding the day of issue and including the day of presentment. Demand instruments shall be presented a reasonable time after issue.

In the case of checks a reasonable time exists so long as the drawer has funds in the bank to pay the check.

Days of Grace.—Where no days of grace exist no time for payment remains after maturity.

Saturdays and Holidays.—Time instruments falling due on Saturday, Sunday or on a holiday, mature the following business day. Demand instruments may mature on Saturday before twelve o'clock noon at the option of the holder.

By Whom Made.—Presentment shall be made by the holder or his authorized agent.

NOTICE OF DISHONOR

(This title covers notice of dishonor for non-payment only, as explained in the last lecture, but that for non-acceptance follows the same rules.)

Second Step is Notice of Dishonor.—Sending to each indorser a notice of non-payment is the second step necessary to hold indorsers liable.

By Whom Given.—By the holder, or by someone acting as his agent; by any party to the instrument who might be compelled to pay the holder and who, if he so paid, would have a right of recourse against the notified party. This means that a prior indorser could

notify another indorser liable to him. An illustration of this principle follows:

A
B
C
D
} Indorsers on note.

Although he is not the holder, C could notify A of non-payment by the maker because A is liable to C.

To Whom Given.—Notice of non-payment may be given to the indorser or to his agent; or, if he is dead, to his personal representative; if he is dead and has no personal representative, it may be left at his last place of business; to his partner; if he is a bankrupt, to his trustee.

When Notice Should be Given.—Notice may be given at once—immediately upon dishonor; if the holder and indorser reside in the same town notice must be given before the end of business hours the day following; if it is given at his residence, before bed-time, say 10 P. M. on that day; if sent by mail, the letter should be deposited in the post office (including sub-stations and mail-boxes, but not letter carriers) so that notice will reach the indorser on the day following.

(NOTE: The "day following" means the day after presentment.)

If the holder and indorser reside in different towns and the notice is sent by mail, it should be in the post office in time to go the day after dishonor. If sent otherwise than through the post office, then it should be received at the same time it would have been received if it had gone by mail. In all cases, the mail is the agent of the indorser, so that if the notice is

lost, that fact does not affect the holder. A short rule is to mail "notice" within twenty-four hours of presentment.

Where Notice is to be Sent.—The order of preference as to the place where notice should be sent is: 1. Indorser's place of business; 2, his residence; 3, his post office address by letter; 4, if the indorser has added his address to his signature, notice should be sent there; 5, to his last known address.

It is important to observe that notice has nothing to do with presentment. The latter is made to the maker; notice is sent to the indorsers.

Waiver of Notice of Dishonor.—Notice of dishonor may be waived; if the waiver is in the instrument, no notice to any indorser is necessary; when it is written upon the back of the instrument by one of the indorsers, notice need not be sent to him but should be sent to all others.

The words "no protest" mean that no notice is necessary as well as that no presentment is necessary.

Form of Notice of Dishonor.—The following is a form of notice which may be sent to indorsers:

MR. F. A. BLANK,
Philadelphia, Pa.

DEAR SIR:

Please take notice that the following instrument upon which you are an indorser was duly presented to the maker for payment at his place of business on the 15th day of March, 1915, between the hours of one and two o'clock, P.M.; whereupon he refused payment of the same.

(Here follows copy of the instrument.)

This is to notify you that as indorser you will be held liable to pay the said instrument.

Yours truly,
(Sgd.) X, Notary, or by the holder.

Notary is Agent of Holder.—The notice of dishonor may be sent by the notary who is employed to make protest; but in any event it must be sent in all cases, whether protest is made or not.

XIX

BILLS AND NOTES (CONTINUED)

PROTEST

Third Step is Protest.—Protest as hereinafter defined (as stated in a previous lecture) is unnecessary in proceedings upon domestic bills and notes, but is necessary in proceedings upon foreign bills and notes. However, as was also noted in a previous lecture, it is general business practice to protest all bills and notes—foreign and domestic—where there are indorsers.

Definition of "Protest."—Protest is a paper prepared by a notary public under his own hand and official seal, reciting the fact that he has presented an instrument—properly described in the protest—to the maker or drawee, for payment or acceptance; and that though properly presented, payment or acceptance was refused.

Reason for Protest.—The purpose of protest in domestic and foreign bills, aside from the requirements of the Act, is to render proof easier for the holder when he brings suit. Consequently, the protest paper, when prepared by the notary is given by him to the holder, who keeps it for use as evidence in case he must sue upon the instrument.

Difference Between Protest, Presentment and Notice.—Protest must not be confused either with presentment or notice; it is not the presentment, but the written proof of it; it is not notice because it is not sent to the indorsers. However, when a notary is

employed to make protest, he usually also assumes the burden of sending out the notices.

FORM OF PROTEST:

PHILADELPHIA, PA., March 15, 1915.

I, WILLIAM BROWN, a Notary Public for the State of Pennsylvania, residing at Philadelphia in the said State, do hereby solemnly declare that on the 15th day of March, A.D. 1915, I presented to the maker named therein at the place specified therein, between the hours of one and two o'clock P.M. on the said day, an instrument of which the following is a copy:

(Here follows a copy of the instrument.)

And then and there payment (or acceptance) was demanded of the said maker (or drawee) but payment (or acceptance) thereof was refused by him.

WHEREUPON, I, the said Notary, at the request of the holder of the bill, aforesaid, HAVE PROTESTED, and do hereby solemnly PROTEST, against all persons and every party concerned therein, whether as Maker, Drawer, Drawee, Acceptor, Payer, Endorser, Guarantor, Surety, or otherwise howsoever against whom it is proper to protest, for all Exchange, Re-exchange, Costs, Damages and Interest, suffered and to be suffered for want of payment (or acceptance) thereof.

WITNESS my hand and notarial seal the day and year first above written.

(Notarial seal.) (Sgd.) WILLIAM BROWN.

XX

BILLS AND NOTES (CONCLUDED)

MISCELLANEOUS

Two Kinds of Negotiable Instruments—Promises and Orders.—The foregoing lectures should have disclosed the fact that there are but two kinds of negotiable instruments—promises and orders. The promise is typified by the promissory note; and the order is typified by the check. Some orders are converted into promises by the action of one of the parties; thus an accepted draft becomes the promissory note of the drawee or acceptor. Again he who is primarily liable—as the drawer—may become secondarily liable as an indorser; thus the drawer of a draft becomes an indorser upon acceptance by the drawee.

Indorser's Contract Resembles Surety Contract.—The indorser's contract liability is in the nature of that of a surety. In effect he says that if the holder affords the person primarily liable an opportunity to pay and he fails to do so, and if the holder will then notify the indorser of these facts, the latter will pay.

Installment Notes in Series.—A man may make a note payable in installments, in which case he should be sure that installment-payments to the holder are noted on the back of the note. The best way to pay sums of money in installments is to make a separate note for each installment, so that a note is surrendered to the debtor when the particular installment is paid.

Bills in a Set.—Drafts designed for foreign use are frequently drawn in duplicate or in triplicate and are known as bills in a set. Of course payment of one is payment of all. The reason for this practice is because foreign mails and foreign travel are still liable to suffer those accidents and unforeseen happenings which have been largely eliminated in domestic intercourse. The way for the acceptor to protect himself is to pay that bill of the set which bears his acceptance.

Discount of Drafts Prior to Acceptance.—The student is frequently puzzled by the discounting of drafts before acceptance; but if he will remember that the drawer is liable upon that draft he will understand that it may be discounted or negotiated exactly as a promissory note. Acceptance merely transfers the burden of primary liability.

Difference Between Checks and Drafts.—A check differs from a sight draft in that it is drawn upon a bank while a draft is usually drawn upon individuals not necessarily engaged in banking. It resembles a sight draft in that acceptance need not be made in writing and payment is simultaneous therewith. It is well to remember, however, that the drawee need not honor the draft; he may choose to pay his debt in some other way. But the bank and its depositor have entered into an agreement whereby the former engages to honor the checks of the latter so long as he has funds on deposit sufficient to meet the amount of the checks presented for payment.

Certified Check — Contrasted With Accepted Draft.—A certified check is an accepted draft in the

ordinary sense of the word, since payment is to be made subsequently to acceptance. Certification operates as an assignment of the funds of the drawer; consequently upon certification the drawer and indorsers are discharged from liability. This is not true of an ordinary draft because there is no special fund which is set aside to pay it.

Bank Drafts.—Checks drawn by one bank upon another do not differ materially from ordinary checks except that the stability of banks lends additional guarantee of payment. They are called bank drafts.

Cashiers' Checks.—Checks drawn by a cashier upon his own bank are called cashiers' checks.

How Long is a Check "Good".—The question arises frequently how long is a check "good." Section 186 of the Negotiable Instruments Act reads as follows: "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." What is a reasonable time depends upon the facts of each particular case, and this is true also as to "loss."

Certificate of Deposit.—A certificate of deposit is an interest-bearing promissory note of a bank. The rate is usually three or four per cent. and the certificate is usually payable on demand.

XXI

JUDGMENT NOTES—JUDGMENTS—EXEMPTION

Suit on a Negotiable Instrument.—If a debtor upon a negotiable instrument fails to pay, the remedy of the holder lies in the courts. If the defendant is the maker, proof of execution of the note by him is sufficient to establish the plaintiff's claim. But if the defendant is an indorser the plaintiff must prove the indorsement and must also show that presentment for payment was made to the maker and that notice of dishonor was given to the defendant indorser.

Judgment Note.—There is a form of note which obviates the trial in court briefly outlined above. Following the recitation of the promise, this note contains a paragraph confessing judgment to the holder of the instrument. These notes are called judgment notes, deriving the name from the fact that judgment may be entered upon them without any court proceedings except the filing of the instrument in the office of the prothonotary or clerk of court.

Judgments by Confession.—Judgments so obtained are called judgments by confession or by agreement.

Waiver of Exemption, Etc.—In addition to the promise and the confession of judgment, a good judgment note will contain a waiver of the benefits of exemption laws as well as waivers of the benefits of laws

relating to stay of execution and inquisition (finding the value of) on real estate.

Judgments—Kinds of Judgments.—The subject of judgment notes leads us naturally to a discussion of judgments in general. A judgment may be briefly defined as a final order or decree of court fixing the rights and liabilities of the parties to a law suit. If the plaintiff seeks damages, the judgment will fix the amount which the defendant shall pay him; but if the judgment is in favor of the defendant, he will owe the plaintiff nothing. Interest and the costs of suit (attorneys' fees are not usually included in costs) follow the judgment. If the plaintiff seeks to recover a particular thing, as in replevin, the judgment will give him that particular thing; if the plaintiff seeks to restrain the defendant from doing something injurious to the former, or seeks to compel him to do something which the plaintiff claims he ought to do, judgment for the plaintiff will establish his right.

Judgments, whether secured by court trial or by confession, have the same results; that is to say, the case is finally disposed of by the court.

Lien of Judgment—Revival.—A judgment is a lien or burden upon real estate at the time of its entry—when it is filed in the prothonotary's office—and for a period of five years thereafter; and it may be revived every fifth year thereafter, without limit, thereby retaining its lien upon the real estate of the defendant. It follows that, unrevived, the judgment loses its lien on real estate at the expiration of the first five years.

Not a Lien on Personalty.—Judgments are not liens on personal property but execution may be issued

upon the judgment whereby either personal property or the real estate of the defendant may be seized and sold, the proceeds of the sale to pay the debt. Execution may issue upon any judgment within twenty years of the date of its entry.

Judgment Index.—Upon the entry of the judgment it is indexed in a book called the Judgment Index, by the prothonotary or clerk of the court in which it was obtained. It may be found under the last name of the defendant and cross-indexed under his first name.

Caution.—When real estate is purchased the buyer is careful to see that there are no judgments against the owner; for the property itself, when subject to a lien, may be sold to satisfy that lien irrespective of its subsequent transfer to an innocent buyer.

Judgments as Investments.—Since judgments bear interest at the rate of six per cent. per annum, those which are liens upon ample real estate are such good investments that execution is seldom issued upon them, they being satisfied at the next transfer of the property. But if there is no real estate upon which the judgment can be a lien or if it is insufficient in value or if the plaintiff needs the money, he will proceed to collect the amount of his judgment.

Execution—Writs.—Execution is the appropriate process by which the collection of judgments is effected. This is too intricate a subject to be discussed here; suffice it to say that there are various writs of execution known as *fieri facias* or *fi. fa., levari facias* or *lev. fa., venditioni exponas* or *vend. ex., scire facias* or *sci. fa.,* foreign and domestic attachment and attachment execution.

Officers of Court.—The officers who serve these writs are known as sheriffs, constables and marshals.

Exemption.—Every defendant, when his goods are seized by the sheriff upon a writ of execution, and if he has not waived it, may claim an exemption; that is to say, keep certain personal property free from seizure. The theory of exemption is that if the creditor be permitted to take the last penny from the debtor, the latter may become a charge upon the community; yet the theory is hardly reconcilable with the undoubted right of the debtor to waive the benefit of the exemption.

Amount of Exemption.—The law of Pennsylvania exempts personal property to the amount of three hundred dollars; this may be made up wholly of cash or of personal property or of both. The value of personal property claimed under an exemption is fixed by appraisers.

In addition to the three hundred dollars exemption, the debtor in some States may claim Bibles, school books, wearing apparel and sewing machines as exempted property.

XXII

MORTGAGES AND CONVEYANCES

In the last lecture we considered one type of lien—judgments. Liens arise in other ways also. The commonest type of lien is that of a mortgage.

Definition of Mortgage.—A mortgage may be described briefly as a pledge or pawn of real estate as collateral security for the repayment of a loan. The loan itself is evidenced by the paper which always accompanies the mortgage—the bond. He who loans the money and takes the mortgage as his security is called the mortgagee. He who receives the money and signs the mortgage is called the mortgagor. Note that the relationship is that of creditor and debtor.

Explanation of Mortgage.—The mortgage itself does not convey the legal title of the property to the mortgagee or to anyone else, although what appears to be a conveyance is recited. It gives the mortgagee a right to sell the pledged property at public sale, if the contracts in the mortgage are broken by the mortgagor. The following are the conditions or contracts in a mortgage:

Promise to Repay Loan.—1. Promise to repay the loan at a fixed or determinable time: In a straight mortgage three or five years and in the case of a building association mortgage, when the stock matures.

Promise to Pay Interest.—2. Promise to pay interest on the loan: The usual rate of interest on a

straight mortgage being five and four-tenths per cent. and six per cent. on building association mortgages. The four-tenths per cent. covers the state tax on mortgages. Interest periods on ordinary mortgages are usually semi-annual, but building association interest is paid monthly.

Promise to Show Receipts.—3. The mortgagor must exhibit receipts for taxes and water-rent and for interest due upon prior mortgages. The time to show these receipts is fixed by the mortgage, usually September first of the current year being the date selected.

Promise to Maintain Fire Insurance.—4. Promise to keep all buildings insured against loss by fire. The policy of insurance approximates the amount of the mortgage and should be given to the mortgagee to hold during the life of the mortgage.

Proceedings to Sell Under a Mortgage.—Proceedings to sell the mortgaged premises are begun upon the writ called scire facias, spoken of in a preceding lecture. If the mortgagor desires to do so, he may file an answer and the case will go to trial in a manner similar to an ordinary contract suit. If there is no defense—and there usually is none—the mortgagee enters judgment on his writ and includes in his damages the face value of the mortgage, all the arrearages of interest, the costs of suit and the attorney's fee reserved in the bond. The property is then advertised for sale by the sheriff and is sold by him. In addition to the amount of the judgment, the sheriff's costs of levy and sale must be paid.

Who May Purchase from Sheriff.—Any person, including the mortgagee, may purchase the property at the sale and the purchaser takes it free from the lien of

the mortgage under which the property has been sold. The sale also discharges all liens of mortgages created subsequent to the one under which the sale is made.

Fund Realized from Sale.—The money realized from the sale is paid into the hands of the sheriff, who pays the mortgage-judgment and costs, returning any unused balance to the mortgagor. Municipal claims are a first lien upon the fund and if it is not large enough to pay them the sale will not discharge them, no matter when they accrued.

Bond Accompanying the Mortgage.—The bond which accompanies the mortgage contains a confession of judgment similar to that in a judgment note. Therefore, in addition to issuing a scire facias on the mortgage, the bond may be entered up and becomes a judgment. This bond-judgment is a lien upon all other real estate which the mortgagor may own; and if the sale of the mortgaged premises fails to produce a sufficient sum to pay the mortgage debt, other property of the mortgagor may be seized and sold under the judgment on the bond.

CONVEYANCES

When a man wishes to purchase real estate, he is met with a number of legal requirements which may appear intricate to him and even burdensome, but which he will find to be devised for his benefit.

Purchaser Pays Costs of Transfer.—The costs incident to the transfer are usually borne by the purchaser. It is true the seller may pay a commission to the person who negotiates the sale for him, but this is really not a part of the transfer expenses.

Written Agreement and What it Should Contain.—The first step to be taken by the parties after they have agreed upon a price is to draw a contract in writing as required by the Statute of Frauds. In this agreement should appear the proper names of the parties, a short description of the property, the price agreed upon, whether or not the property is sold subject to incumbrances and the amount thereof, and the date of settlement. It is also a receipt for the money paid to bind the bargain—down money, as it is called. The agreement should also provide for an apportionment of taxes, water-rent and interest on any incumbrances, and of house-rent if the property be presently leased; a provision that the seller will pay any unpaid gas bills; a further provision should be made as to the date when possession of the property will be given. Most important of all is the specification that the title is good and marketable. If a newly-erected or recently-altered building is upon the property there should be some agreement guarding against mechanics' liens.

Preparing New Deed.—Immediately after the contract is signed the purchaser borrows the deed of the vendor or secures a copy of the description of the property. It is this description that he uses in the preparation of his own deed which he will tender to the vendor for execution on the day of settlement.

Examining or "Searching" Title.—Then the vendee will order title searches and insurance from one of the companies engaged in that business. The title company searches or investigates the title of the premises to be transferred with special reference to mortgages, judgments and municipal claims and to make

certain that the supposed vendor is really the owner in fee. After completing its search, a certificate showing the incumbrances upon the property is given to the purchaser; if there are incumbrances upon it not contemplated in the agreement of sale, the vendor is notified to clear them off. If he is unable to do so the vendee is not obliged to take the property and may recover the money which he has paid down and for which his agreement of sale is a receipt.

Title Company May Pay off Incumbrances.—If the purchase price is sufficient to clear off the incumbrances, the purchaser may pay his money to the title company who will pay thereout the amount of the incumbrances; paying the balance, if any, to the vendor.

Settlement.—On the day fixed for settlement the parties assemble at the title company's office and their clerk ascertains the amount due to the vendor, apportioning municipal claims, interest and house-rent to the day of settlement.

Recording.—The deed executed by the vendor is then recorded by the title company and when recorded it is delivered to the vendee together with a policy of title insurance.

Title Insurance.—By their title policy the company guarantees to the purchaser that his property is free from all incumbrances except those which the parties have agreed shall remain upon the property.

XXIII

ESTATES—WILLS

Definition and Explanation of "Property".—The word "property" means that interest or ownership which a man may have in material things. Commonly, however, the term is used to designate the material thing itself and not the interest in it. Thus we say "real property" in describing land and buildings; and "personal property" in speaking of movable things and choses in action. As we have seen, rights in personal property are easily understood and analyzed, but rights of ownership in real estate are much more complicated and perhaps not so easy to understand.

Definition of "Estate"—Kinds of Estates.—A property right, interest or ownership in land is called an estate. Generally, these ownerships or estates may be divided into:

1. Estates of inheritance.
2. Estates not of inheritance.

Estate of Inheritance.—The first may be described as that ownership which under intestate laws will descend to the heir of the owner. If the estate has this quality it follows that the owner may sell it outright in his lifetime or dispose of it by will at his death. Such an estate is called a fee simple.

Estates Not of Inheritance.—Estates not of inheritance include all other interests in land. Thus one may hold land for the term of his life or of the life of another, called a life estate; or he may hold land

for a term of years, called a leasehold estate; or he may be permitted to remain as a tenant at the will or pleasure of another.

Property—How Acquired.—All property rights are acquired in two ways:

1. By descent or operation of law, which includes property acquired under the intestate laws.

2. By purchase, which includes property acquired in any other way than by descent, as by deed, will or gift.

Intestate Distribution—Lineals.—The laws regulating the descent of property from the decedent (the deceased) to his heirs vary slightly in the different States. In general it may be said that the decedent's property, subject first to dower and curtesy, is divided among his children in equal shares, the children of a deceased child (grandchildren of the decedent) taking their parent's share; if there are no children the property will be divided among the grandchildren in equal shares; and so on downwards. But if there are no descendants, then the decedent's property will go by operation of law to his father and mother, if they be both alive, and they will take by entireties, that is, they both own the whole, and upon the death of either, the survivor becomes the owner of the whole; if they both be dead, then to the intestate's grandparents; and so on upwards. These persons, who are directly in the line of the intestate, are called lineals.

Collaterals.—If there are no lineals, then the property of the decedent will go by operation of law to his brothers and sisters, the children of the deceased brothers and sisters—nephews and nieces—taking their parents' share. Failing these heirs the property would go to

the heirs of half-brothers and sisters, following the same rules. These persons not in a direct line with the decedent are called collaterals.

Escheat.—If a man dies intestate leaving no surviving heirs, his property goes to the State. This is called escheat.

Dower.—Dower is the interest which a woman acquires in her husband's property by reason of her marriage. So long as her husband lives her dower interest cannot be separated from his ownership. The amount of the interest which is set aside for her at his death differs in the various States. In Pennsylvania, if there are no children she takes one-half of her husband's personal property absolutely and one-half of his real estate for her life. If there are children, the wife takes one-third of the personal property absolutely and one-third of the real estate for her life. In addition to these shares she is entitled to an exemption of three hundred dollars, whether or not there are children; if there are no children, by the Act of 1909, she is entitled to five thousand dollars more. While the dower interest cannot be separated during the lifetime of her husband, proof that it exists is found in the fact that he cannot dispose of his real estate, freed from her dower interest, unless she joins in the conveyance or deed.

Curtesy.—Curtesy is the interest in his wife's property which the husband acquires upon marriage. However, as in the case of dower this interest cannot be separated till the death of the wife, meanwhile limiting conveyances intended to be made by the wife; that is, he must join in them. The extent of curtesy is, if there are no children, that the husband takes all the

personal property absolutely and all the real estate for his life; if there be children, the husband takes all the real estate for life and shares equally with the children absolutely in the personal property.

Where property passes by deed or conveyance we have exemplified the popular idea of purchase. An estate of inheritance or one not of inheritance may pass by deed.

One who takes property under a will is a purchaser the same as though he took by deed.

Extent of Estate Which May be Purchased—Reversion—Remainder.—He who takes by purchase may take an entire interest or ownership (the equivalent of complete ownership or estate of inheritance) or a limited estate. If the estate or ownership in land is for a limited time, when the estate has expired, the property will revert or go back to the previous owner. This is called reversion. If the estate created for a limited time is by authority of the grantor subsequently to pass to another when the limited estate has expired, the estate left over is called a remainder.

Tenants in Common—Joint-tenants.—If either through inheritance or purchase a number of persons share in a single piece of property they are either owners in common, called tenants in common; or joint-owners, depending to a certain extent upon the language of the instrument under which they took. It is important to know whether these owners are tenants in common or joint-tenants for this reason: That in a joint-tenancy, if one of the joint-tenants dies, his share becomes the property of his surviving former co-owners. This is called survivorship.

WILLS

Definition of a Will.—A will is the testamentary disposition of a man's property, either real or personal, or both, made in accordance with certain prescribed forms of law, which is to take effect at his death.

Any person who has become of age and is of sound mind may make a will.

How Will is Made.—The law usually provides that all wills must be made in writing and signed at the end thereof by the testator, unless he is prevented from doing so by the extremity of his last illness; or by someone in his presence and at his express direction.

Non-Cupative Wills.—In addition to wills of this character, there are wills made orally. However, such wills can only dispose of personal property and are valid only where a man has been prevented by the extremity of his last illness from making a written will, and must be reduced to writing within six days following the death of the testator. These are called non-cupative wills.

Proof of Signature—Bequests to Charity.—In a written will the signature of the testator must be proved by two witnesses. In Pennsylvania, where the will contains bequests to charities, in order for these bequests to be valid, the will must have been made more than thirty days before the date of death of the testator and witnessed by two subscribing witnesses. Death of the testator before the expiration of the thirty days would invalidate only the bequests to charity.

Without Undue Influence.—The testator should be of sound mind at the time he makes his will, and it

must have been made without duress, coercion and undue influence. In other words, it must be the testator's will, expressed without unlawful influence or restraint.

Revoking Will—Codicils.—As said above, a will takes effect at the date of death of the testator. Thus, at any time prior to his death, after making the will, he may change its terms, or revoke it altogether. He may change it or revoke it by what is called a codicil. This is a paper drawn up with the same formalities as the will.

Other Methods of Revoking Will.—The testator may also change or revoke his former will in the following ways:

1. By making a will inconsistent with the former one.

2. By other writing duly executed and proved.

3. By burning, cancelling, mutilating, obliterating or destroying the former will, done either by the testator himself or by someone in his presence and at his express command.

Revocation by Law.—If a man makes a will, then marries and dies, his will is revoked so as to allow the widow and children to take such shares as they would have been allowed under the intestate laws. The rest of the estate would then pass to those named in the will.

If a married man makes a will and later has a child not provided for in it, it is revoked to like extent; that is, the child will take his share under the intestate laws and the will disposes of the balance of the estate.

A single woman's will is revoked by marriage, and is not revived by the death of her husband.

Election of Husband or Wife to Take Against Will.—Either wife or husband, upon the death of the other, can elect to take against the will of the deceased. In such case the wife is entitled to the share she would have received had her husband died intestate, while the husband is entitled to the share his wife would have taken out of his estate had he died intestate; with the exception that he is not entitled to the three hundred dollar exemption nor the five thousand dollar exemption.

Probate.—After the death of the testator, his will is admitted to probate, that is, the Register of Wills or Surrogate decides whether or not the will produced is the will of the testator; and if it is, then the bequests and legacies in the will are distributed according to its provisions.

Executor—Administrator.—The person named as executor in the will manages the estate and distributes it. Unless he is a foreign executor, he need not give a bond. In intestacy, the Court appoints an administrator who must file a bond with two sureties. Both executors and administrators must file satisfactory accounts before the Court will discharge them. Neither has any control over real estate or rents unless the will so provides.

XXIV

PARTNERSHIPS

Introduction.—It is difficult to frame a definition of the word "partnership" which will guide us in a particular case in determining who is and who is not a partner. However, the following definition, explained by the rules given below, is sufficiently explicit for our purposes.

Definition of Partnership.—A partnership exists when two or more persons agree to associate themselves together, as co-owners, to carry on a business, sharing profits and losses. The agreement is usually in writing, but in some cases the relationship may be established by the acts or omissions of the partners or by other circumstances.

Rules to Determine Existence of Partnership.—1. A share in the profits of the business is prima facie evidence that the person receiving it is a partner, but no such inference may be drawn if such profits were received in payment:

a. Of a debt, by installment or otherwise.

b. Of wages to an employee and rent to a landlord.

c. Of an annuity to a widow or representative of a deceased partner.

d. Of interest on a loan, though the ratio of payment varies with the profits of the business.

e. For the sale of the good will of a business or other property, by installment or otherwise.

2. Sharing in the losses of a business is evidence of a partnership when coupled with number 1.

3. Joint-tenancy, tenancy in common, tenancy by the entireties or part ownership do not alone establish a partnership, whether such owners do or do not share in profits arising from their use of the common property. In other words, the sharing of gross returns does not of itself establish a partnership, even though the persons sharing them have a general or common interest in the property from which the returns are derived.

Kinds of Partners.—Partners are general, special, ostensible, silent or by estoppel.

General.—A general partner is one who has equal rights with the others concerning the management of the business and who shares profits and losses equally with them.

Special.—A special partner is one who has no voice in the management of the business and is entitled to a limited return or profit; and who is only liable for losses to the extent of the capital he has invested in the business.

Ostensible.—An ostensible partner is one who is known as a partner and who may be liable generally or specially.

Silent.—A silent partner is one who is a partner though that fact is unknown to the public. Such partner may be either general or special.

By Estoppel.—A partner by estoppel is one who, by his acts or his failure to act when he was in duty bound to do so, has lost the right to deny that he is a partner and is therefore liable as such.

The student will observe that a man can be a general

as well as a silent partner or an ostensible partner by estoppel, etc.

(A) RELATIONS OF PARTNERS AMONG THEMSELVES

Partners are Trustees.—Respecting his other partners, each partner is a trustee. He must act in good faith in all of his dealings in connection with partnership affairs. On demand he shall furnish full information concerning matters affecting the partnership, to his fellows, to the legal representative of a deceased partner or to a partner under legal disability.

Ordinarily the relations between partners are governed by their mutual agreement, but subject to such agreement the law provides as follows:

1. All partners have equal rights concerning the management of the business.

2. Each partner shall be repaid his contributions—whether they consist of capital or advances—and shall share equally in the profits and surplus remaining after all liabilities—including those due to partners—are satisfied; and must contribute his share of the losses sustained by the partnership—whether of capital or otherwise—according to the ratio of his share of the profits.

3. The partnership must indemnify each partner in respect to payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business or for the preservation of its business or property.

4. No partner is entitled to compensation for managing partnership affairs, except that a surviving part-

ner is entitled to a reasonable sum for his services in winding up the business.

5. Differences or disagreements concerning ordinary matters connected with the partnership business may be decided by a majority vote of the partners; but no act in violation of an agreement between the partners may be committed without the consent of all the partners.

6. Partnership books should be kept at the principal place of business and each partner at all times should have access to them and may inspect and copy any of them.

7. Each partner has a right to a formal accounting of partnership affairs:

a. If the right exists under the terms of an agreement.

b. Whenever other circumstances render it just and reasonable.

8. Each partner must account to the others (and hold as trustee for them) for profits derived by him from any transaction connected with the formation, conduct or liquidation of the partnership or from the use by him of its property.

Duration of Partnership.—The duration of a partnership depends upon the agreement. However, where a partnership, created for a fixed term or to accomplish a particular undertaking, is continued, without an express agreement, after the term expires or the particular undertaking has been accomplished, the rights and duties of the partners remain the same as they were so far as may be.

Partners are Co-owners.—Partners are co-owners with each other of specific partnership property, holding the same as tenants in partnership. A partner's right in this specific partnership property is not subject to dower, curtesy or allowances to widows, heirs or next of kin. Nor can this right of a partner be assigned.

May Assign Partnership Interest.—On the other hand, a partner's interest in the business, which represents his share of the profits and surplus, is personal property, subject to assignment.

Rights of Assignee.—Assignment by a partner of his interest to another does not give the assignee any rights in the management of the business; but merely gives him a right to such profits as would have accrued to the assignor. If the partnership is dissolved the assignee is entitled to receive his assignor's interest and may require an accounting thereon from the day of the date of the last account which was agreed to by his assignor and the other partners.

(B) DISSOLUTION AND (C) WINDING UP

(B) Dissolution

Causes of Dissolution.—Dissolution of a partnership means the change in partnership relations caused:

1. By a partner leaving the firm through death, bankruptcy or otherwise.
2. By admission of a new partner.
3. By completion of the particular undertaking specified in the partnership agreement or by completion of the term during which the partnership was to exist.
4. By mutual consent.
5. By breach of the partnership agreement.

6. By reason of anything which makes the business itself illegal or unlawful for the members to carry it on as partners.

7. By decree of court.

Effect of Dissolution on Partners' Authority.—Dissolution terminates all authority of any partner to act for the partnership except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not yet finished.

Effect of Dissolution on Partners' Liability.—It is hardly necessary to say that dissolution of a partnership does not of itself discharge existing liabilities of the partners. Even in the event of the death of a partner his individual property remains liable for such obligations of the partnership as were incurred while he was a partner, under and subject nevertheless to prior payment of his separate debts.

But dissolution may affect liability of partners among themselves, either expressly or impliedly; and the partnership creditors may expressly or impliedly discharge any partner after the latter has quit the firm.

(C) Liquidation (Winding up)

Partnership Property to be Applied to Payment of Debts.—When the partnership is dissolved, each partner, as against the others, and against persons claiming through them, may have the partnership property applied to pay the debts and the surplus, if any, applied to pay the net amounts owing respective partners.

Order of Priority of Debts.—In winding up a partnership the following debts are paid in the order of priority in which they appear in the appended list, subject

to some agreement to the contrary which the partners may make:

1. Those owing to creditors other than partners.
2. Those owing to partners for advancements made by them.
3. Those owing to partners on capital account.
4. Those owing to partners respecting their profits.

Insufficient Assets—Contributions from Partners.—If the assets are insufficient to satisfy the liabilities the partners should contribute their shares of the excess liabilities; and in addition should make up the share of an insolvent partner. Excess liability contributions may be enforced against any general partner to the full extent of his private resources; but if he has separate creditors they are entitled to be satisfied out of his separate property before the same may be levied upon by his partnership creditors.

(D) RELATIONS OF PARTNERS TO THIRD PERSONS

Tort Liability of a Partner—Contract Liability.—Partners are liable for the torts of a partner who acted within the scope of his authority as a partner or under special authority of his co-partners. Of course they are liable also for the torts of their agents. Partners are liable jointly for the contracts made by any one of the partners when such contract has been made within the authority or apparent authority of the partnership.

Charging Order.—One who secures a judgment against a partner upon an individual claim, may make application to Court to seize or charge the debtor's interest in the partnership. This is called a charging order.

The Court may make such order as it shall deem necessary and may even appoint a receiver for the debtor partner.

Caption of Suits Against Partners.—Suits against a partnership must be brought in the names of the partners as follows:

John Jones *vs.* William Smith and James Brown, trading as Smith, Brown & Company.	C. P. No 1, June Term 1915. No. 9999.

The relations of partners to strangers upon dissolution have been sufficiently discussed above.

Special Laws—Limited Partnerships.—In some states there is statutory provision made for limited partnerships, where the liability of one partner is limited by the amount of his contribution, as though he were a stockholder in a corporation.

Again, some State laws require registration of partnerships in order to facilitate court proceedings.

XXV

CORPORATIONS—JOINT STOCK COMPANIES—BUILDING AND LOAN ASSOCIATIONS

Definition of a Corporation.—A corporation is an artificial person or entity, composed of a number of natural persons, created by law to accomplish a purpose whose performance may exceed the capacities of an individual or partnership.

Classification of Corporations.—Corporations may be briefly classified as follows:

1. Public, such as states and their municipal subdivisions (cities, boroughs, etc.)

2. Quasi-public, such as public service companies (railroads, power companies, etc.)

3. Private, which may be for profit (business corporations generally) or those not formed for profit (churches, hospitals and clubs).

Foreign and Domestic Corporations.—Corporations formed by the State within which they are conducting their business are called domestic corporations; while if incorporated under the laws of some other State they are known as foreign corporations.

Each State prescribes a method by which individuals may apply to a proper official for the issuance of such charter as the State's general laws provide. Very few private corporations are now formed under special laws.

Applications for Charter—Contents.—Applications for charter usually contain the following information:

1. The proposed corporate name.
2. Purpose for which incorporation is sought.
3. Place where business is to be transacted.
4. Duration of corporate existence.
5. Names and residences of subscribers and the number of shares subscribed by each.
6. Amount of capital stock and the number and par value of the shares.

Advertisement.—Most State laws require that charter applications be suitably advertised, and others require that a proportionate amount of the capital stock shall be paid to a treasurer named in the application before the corporation may commence business.

Incorporators.—The corporate existence necessitates stockholders, officers and directors. Stockholders usually hold meetings annually at which they elect persons who shall manage corporate affairs for the ensuing year. These persons are known as directors and appoint agents who are known as executive officers. The president, vice-president, secretary and treasurer are thus designated.

Corporate Powers.—A corporation has the following powers:

1. To possess a corporate name and to sue and be sued in that name.
2. To adopt and use a corporate seal.
3. To elect managers or directors for the purposes of the business.
4. To adopt by-laws.

5. To issue stock.

6. To have succession of stockholders and such length of corporate life as the charter provides.

7. To carry on such business as is authorized by the charter.

Such corporations as are public and quasi-public in their nature may exercise the right of eminent domain.

Corporate Liability.—A corporation is rendered liable in contract and in tort through the acts of its agents, and may be prosecuted criminally where the punishment imposed is a fine. All officers and other appointive agents while acting for the corporation render it generally liable for the consequences of their acts.

Charter is Contract—Involuntary Surrender.—The charter of a corporation, being a contract between a State and the incorporators, a State cannot revoke it without the consent of the stockholders, unless some such right of revocation is reserved in the grant. Accordingly, the general corporation laws of most States now provide that any charter issued thereunder may be altered, amended or repealed by the incorporating State under suitable legislative enactment enforcible by a procedure called quo warranto, in charge of the State's attorney-general. Corporations may also be dissolved involuntarily by bankruptcy.

Voluntary Surrender of Charter.—The corporation may surrender its charter voluntarily or it may expire by limitation either of time or otherwise.

Receiver.—When a corporation dissolves—voluntarily or involuntarily—a receiver is usually appointed by the court to hold the corporate property, apply it to the payment of the corporate debts and to divide the re-

mainder among the stockholders in proportion to their holdings.

Capital Stock.—The capital stock of a corporation is divided into a number of equal parts, called shares of stock. These shares are evidenced by certificates which may be freely transferred by assignment. Stock may be common, indicating ordinary ownership; preferred, indicating an ownership which possesses a prior right to dividends and distribution upon dissolution of the corporation. Ownership of preferred stock is similar to ownership of corporate bonds. Sometimes preferred stock is merely such for the current year; but if it is cumulative preferred stock its preference to dividends may accumulate from year to year. To illustrate: The X Company has outstanding seven per cent. cumulative preferred stock upon which nothing has been paid for four years. This year the Company makes a dividend profit of twenty per cent. All of this would be paid to the cumulative preferred stockholders, leaving a balance of eight per cent. still due them which would have to be paid out of subsequently earned dividends before common stockholders would receive anything.

Corporate Loans.—Corporations are frequent borrowers. The favorite method of raising money is for the corporation to make a mortgage of its plant and other assets to a banking house; and the amount of the mortgage is then divided up into equal parts called bonds, which, properly evidenced in writing and executed by the corporation, are sold to the public; and the banking house or general mortgagee is trustee for these bondholders. It is true that a corporation may borrow by

straight bond and mortgage, by note or by issuing debenture bonds; but usually the trustee form of mortgage with bonds issued thereunder is adopted.

Rights of Stockholders.—Stockholders, as members of the artificial person or corporation, have the following rights:

1. To vote at stockholders' meetings, casting one vote for each share of stock held. Where the statutes and by-laws permit, stockholders may vote cumulatively—that is, in electing directors, a stockholder may cast as many votes for a particular director as there are directors to be elected times the number of shares of stock he holds.
2. To elect directors or other elective officers.
3. To make by-laws.
4. To share in the dividends or profits.
5. To inspect the books.
6. To stand as a candidate for office in the corporation.

Liabilities of Stockholders.—Excepting the case of national bank stockholders, one holding full-paid stock is not liable even though upon dissolution of his corporation its debts exceed the value of the assets. In other words, his liability is limited by the full-paid par value of his stock. However, if his stock is not fully paid for, the creditors may compel him to pay the balance still due; and this is true even though his stock is marked "full paid and non-assessable" if such is really not the case.

Double Liability.—National bank stockholders are liable for an additional amount equal to the par value of the stock for which they already have paid in full.

JOINT STOCK COMPANIES

In some States there is a provision for partnership associations or joint stock companies. These associations partake of the nature both of a common law partnership and of a corporation.

Comparisons With Corporations and Partnerships.—They resemble a corporation in that a stockholder's liability for the debts of the association is limited by the amount of stock for which he has subscribed; the business of the association is conducted by "managers" who correspond to the directors of a corporation. They must sue and be sued in the association name. They resemble partnerships in that members have a right to choose their associates and in the fact that transfer of a member's interest gives the transferee a right to an accounting only.

The use of the word "limited" is generally required, appearing on signs, stationery and checks after the name of the association.

BUILDING AND LOAN ASSOCIATIONS

A building and loan association is a corporation whose primary purpose is to enable stockholders to purchase homes. The par value of its capital stock is usually fixed at two hundred dollars per share and is paid for by members in installments of one dollar per share per month. Without investment a period of two hundred months would elapse before the share would be fully paid for; but the money received from shareholders is immediately invested at the rate of six per cent. per annum, and this interest, plus premiums, membership

fees, fines and original contributions usually equals two hundred dollars a share in less than one hundred and forty months. When the shares are fully paid their value is distributed in cash to the stockholders. Some associations use certificates of stock but in most cases the evidence of membership held by the stockholder is his receipt book. Of course his ownership or interest is transferable by assignment.

Loans.—In addition to ordinary members there are borrowing members, who may borrow that which they have already paid in—a stock loan, or may borrow on the security of real estate which is pledged under a bond and mortgage to the association.

Loans on Mortgage.—To secure a mortgage loan of sixteen hundred dollars, A may subscribe for eight shares of stock upon which he pays eight dollars per month; and he must pay eight dollars per month as interest, a total of sixteen dollars per month. When the shares mature there are sixteen hundred dollars to repay to the association its loan.

Safety Features.—Since building and loan associations are really corporations to encourage savings, they are under control of State departments who make examinations and require reports. The officers who have charge of the association's moneys are under bond, so that, when properly managed, a building and loan association offers the best medium for investment of money by persons in moderate circumstances.

XXVI

TORTS—CRIMES—WRIT OF HABEAS CORPUS

Definition of Tort.—Failure to discharge a duty which has been imposed by law, if it leads to civil action for damages to recompense the injured party, is called a tort.

Kinds of Torts.—The commonest kinds of torts are negligence, where some one is injured by reason of the carelessness of another; false arrest and malicious prosecution, where one is arrested and imprisoned upon a malicious charge and without reasonable cause; slander, the spoken word which injures another person's reputation and its complement, libel, which is the written word having the same result; assault and battery, which is a physical attack upon another; deceit, where one man has perpetrated a fraud upon another; trespass upon land, which means entering upon real property without permission from the owner.

Remedies for Torts.—All these are actionable as torts, that is, money damages may be recovered from the guilty party as compensation for injuries sustained. Assault and battery and libel are crimes as well, that is, the community will punish the offender by fine or imprisonment. It is well to note that except under certain special statutes, fines are paid into the public treasury, whereas damages are paid to the injured party.

Definition of Crime.—A crime is a public wrong, while a tort is a private wrong.

Theory of Punishment.—Public wrongs are punished by the State or community upon three theories:

1. To deter others from doing the same thing.

2. To punish the guilty party and restrain him from repeating his offense.

3. To reform the criminal himself by subjecting him to discipline.

The Legislature specifies what are public wrongs or crimes and what shall be the punishment for committing them.

Act May be Crime and Tort Also.—Practically all crimes are also torts; and the State may punish the guilty party for his crime while the private prosecutor who has suffered injury or loss may sue him for damages. Thus the State may execute a murderer and the family of the murdered man may sue the murderer and his estate for damages.

Crimes, Torts and Breaches of Contracts Compared.—The difference between crimes, torts and breaches of contracts appears clear if they are compared in the following ways:

1. What is the obligation and how does it arise.

2. To whom is the obligation due.

3. What are the consequences of the breach.

Thus the breach of a contract is the breaking of an obligation which has been voluntarily assumed; whereas torts and crimes are breaches of duties imposed by the community for the benefit of all. The obligation of a contract is due to a particular person only—the co-contractor; whereas torts and crimes are breaches of obliga-

tions owing to every person in the community. Since torts and contract breaches are of an essentially private nature, damages awarded to the injured party are sufficient to satisfy the law; but a crime, striking terror to the entire community, must be punished by the public; to permit the criminal to pay his way would be subversive of all law and order.

May Settle Contract Breach and Tort Out of Court.—It follows that contract and tort cases may be settled by the parties without recourse to law; or even if suit has been begun.

Compounding a Felony to settle Grave Crimes Out of Court.—Not so with a crime, for while it is true that the lesser crimes, called misdemeanors, sometimes may be settled out of court, the attempt amicably to adjust a grave crime or felony is in itself a crime. Thus an attempt by the widow to make a money settlement with the murderer of her husband would result in her indictment for compounding a felony.

HABEAS CORPUS

Explanation of Writ.—Habeas corpus is a writ summoning into court anyone unlawfully detaining or confining another. Process issues in the name of the State, the petitioner for the writ being known as the relator. The defendant named in most cases is the warden of a prison. Upon service of the writ, the prisoner must be produced in open court when his accusers or those responsible for his detention must show cause why he should be restrained of his liberty.

Right to Obtain Writ May be Suspended.—By the Federal and State Constitutions the right to obtain a writ of habeas corpus is guaranteed, although it may be suspended by the President of the United States or Governor of a State in times of great public danger.

Must be Actually Restrained of Liberty.—Habeas corpus may issue out of a Federal as well as from a State court if the accused is actually confined; but it may not be obtained if he has been liberated on bail or otherwise.

XXVII

COURTS—STATUTE OF LIMITATIONS—SET-OFF

Courts Classified: Of Record; Not of Record.—Courts may be divided into two classes, those of record and those not of record. The courts of record are:

1. Municipal, specially established in large cities, such as Philadelphia and Chicago.
2. Commons Pleas or County.
3. Orphans' or Surrogates'.
4. Quarter Sessions of the Peace, Oyer and Terminer and General Jail Delivery.
5. Superior and Supreme—appellate courts.
6. The United States District Courts.
7. The United States Circuit Courts of Appeals.
8. The United States Supreme Court.

Courts not of record include:

1. Justices of the Peace.
2. City Magistrates.
3. United States Commissioners.

Jurisdiction of Municipal Courts.—The Municipal Court of Philadelphia was established by Act of Assembly in 1913. It has jurisdiction in contract cases to an amount not exceeding six hundred dollars, and in tort cases to an amount not exceeding fifteen hundred dollars. Its jurisdiction also includes desertion, non-support and juvenile cases. This Court was created as the first step in abolishing the office of Magistrate and also to relieve the congested lists in the Common

Pleas Courts. Trials are had before a judge without a jury unless a jury trial is demanded. This court has a limited criminal jurisdiction, too.

Jurisdiction of County Courts.—The Common Pleas or County Courts have jurisdiction in contract cases to any amount. Nor is there a money limit to their jurisdiction in tort cases. They have jurisdiction under various laws to hear applications for appointments of guardians and committees in insanity and feeble-minded cases. The judges of the Common Pleas are usually judges of the criminal courts, also, one of their number being appointed therein monthly.

Jurisdiction of Orphans' Courts.—The Orphans' or Surrogate's Court has jurisdiction over the estates of deceased persons and over appointments and discharge of guardians for minors. The Register of Wills is ex-officio Clerk of the Orphans' Court, so that the entire administration of estates is under one judicial control.

Criminal Courts.—The Courts of Quarter Sessions, Oyer and Terminer and General Jail Delivery are so closely allied that they will be treated as one. The Quarter Sessions is the court where the lesser crimes are tried. This Court in Pennsylvania also has jurisdiction over applications for the sale of liquor, the appointment of viewers to assess damages in eminent domain proceedings and the granting of licenses to private detectives. The Court of Oyer and Terminer is the Court where grave criminal charges are tried, such as murder, manslaughter, highway robbery, etc.

Appellate Courts.—The Superior and Supreme Courts are known as appellate or appeal courts. The Superior Court in Pennsylvania has jurdisdiction of

appeals in civil cases to an amount not exceeding fifteen hundred dollars and exclusive appellate jurisdiction in divorce and in most criminal cases. The Supreme Court, however, may grant appeals in any case from the Superior Court. The Supreme Court has original appellate jurisdiction in all cases involving more than fifteen hundred dollars. It also has special original jurisdiction in certain cases.

Jurisdiction of United States District Courts.—The District Court of the United States corresponds to the Common Pleas in its civil jurisdiction and to the Quarter Sessions and Oyer and Terminer in its criminal jurisdiction. It has special jurisdiction over all cases in which there is a question involving the construction of the Constitution of the United States; and where the parties litigant are residents of different states. For either of these reasons a case begun in a State court may be removed to the United States District Court upon petition filed therein.

Federal Appellate Courts.—The United States Circuit Court of Appeals is an appellate Court to which appeals lie from the District Court.

The United States Supreme Court is the Court of last resort either on appeal from the United States Circuit Court of Appeals or from a State Supreme Court. The Supreme Court of the United States also has original jurisdiction in certain cases; an illustration of this is where states are parties litigant.

Few Appeals from State Court to United States Supreme Court.—Appeals from State Supreme Courts to the United States Supreme Court are infrequently made since they must be specially allowed either by the

State Supreme Court whose decision is questioned, or by a Justice of the Supreme Court of the United States.

Magistrate and Justice Courts.—Courts not of record, such as Magistrates' Courts or Justice of the Peace Courts, are so called because they keep no permanent record of the cases heard. Their powers are extremely limited and the judges need not be learned in the law. Magistrates' Courts have jurisdiction in contract cases to an amount not exceeding one hundred dollars but appeals to the Municipal or County Courts lie where the amount of the judgment exceeds five or ten dollars. The judges sit as committing magistrates to hear evidence in criminal cases. They may discharge the prisoner; or hold him to bail and return the case to court; or summarily convict and sentence him. Appeals lie from summary convictions in criminal cases since the Constitution guarantees the right of trial by jury. Magistrates have no jurisdiction in tort cases.

Federal Magistrates.—United States Commissioners are the committing magistrates of the Federal Courts with similar powers to the State magistrates. Crimes against the United States include counterfeiting and violation of the postal laws.

STATUTE OF LIMITATIONS

Reason for Law.—In order to discourage the suing out of old claims, whether they arise from contract or in tort, as well as to protect a man against stale prosecution, the Legislature of each state has limited the legal life of a civil right and of a criminal charge. And when the period fixed by the statute has expired, the claim or charge dies and neither suit nor prosecution

may then be commenced. They are said to be "barred" by the Statute.

Periods of Limitation in Contract.—Ordinary contract claims are barred at the expiration of six years from the time the debt became due; those arising out of contracts under seal are barred by the Statute at the expiration of twenty years. The due date of a book-account where there are debits and credits is the date of the last entry and the entire account may be sued upon although the first entry is more than six years old.

Revival of Barred Claim.—A debt may be revived by acknowledging it, thus removing the bar of the Statute. Revival may take place as follows:

1. By the debtor making a new promise to pay.
2. By paying part of the principal of the debt.
3. By the debtor paying interest on the debt.

Period of Limitation in Tort.—All tort actions are barred by the Statute at the expiration of two years from the date when the cause of action arose; although by special statutes some tort actions are barred at the expiration of one year.

Period of Limitation in Criminal Cases.—Ordinary criminal cases may not be prosecuted after the expiration of two years from the date when the offense was committed. This period applies to most of the lesser crimes or misdemeanors. However, some cases of embezzlement by trustees or others in a fiduciary capacity are barred in from three to five years. The grave crimes are either not affected by the Statute or else the term during which prosecution may be begun is greatly increased in length. For instance, murder is never barred by the Statute.

Prosecution Stops Running of Statute.—The running of the Statute in favor of the defendant is said to be tolled or stopped when the prosecution is begun, even though the defendant has fled the jurisdiction of the court. Thus I may swear out a warrant for the arrest of A, charging him with embezzlement, and secure an indictment against him; and although he may flee from the State of Pennsylvania and I cannot find him for five years yet the Statute does not run in his favor.

The Statute is tolled in civil cases when suit is commenced.

SET-OFF

Definition.—Set-off, or counter-claim as it is sometimes called, is a remedy created by statute to prevent circuity of action and to save expense and time in litigation.

Set-Off May Extinguish Plaintiff's Claim.—A defendant in a contract suit may defend against the plaintiff by averring a counter-claim arising out of another contract made between the parties; and this counter-claim, if allowed by the court, may diminish or completely extinguish the claim of the plaintiff; indeed, if it is allowed in a larger sum than the plaintiff's demand, the defendant may take judgment for the excess and issue execution against the plaintiff.

Must be in Contract.—To be allowed as a set-off under the law, the counter-claim must arise from a contract claim; no tort claims can be used as a set-off. The set-off need not be for a liquidated amount, however, and when the defendant claims it, he asks the court to grant him a certificate of damage if he can prove the amount of it at the trial of the case.

XXVIII

CIVIL PROCEDURE

Definition.—Civil procedure is the method prescribed by law to determine the rights and liabilities of parties to a civil action. Where A sues B for breach of contract it is a civil action and the judicial method used to determine the rights and liabilities of A and B is called civil procedure. Civil actions include all suits at law and in equity excepting those which are of a criminal nature.

Parties.—The parties to an action are the plaintiff and the defendant. The plaintiff is the person bringing the suit while the defendant is the person against whom it is brought.

Where Suits are Instituted.—Suits involving small sums of money may be entered before a magistrate or justice of the peace, while those involving larger sums may be instituted in the Municipal and Common Pleas Courts.

Summons and Statement of Claim.—The plaintiff first files a statement of claim or paper setting forth his demand with his reasons therefor. This is filed with the Prothonotary or clerk of the court and, together with a summons, is served on the defendant by the Sheriff; the summons being a command to the defendant to appear in court on a specified day. If the defendant does not appear, judgment may be entered against him.

Answer of Defendant.—After the statement of claim has been served upon the defendant he has a certain length of time within which to file an answer, some-

times called an "affidavit of defense," which recites the facts upon which he relies for his defense. If he does not file his answer within the specified time—usually from ten to fifteen days after service upon him of the statement of claim—judgment may be entered against him for want of it. If the answer when filed is deemed insufficient to make out a prima facie defense, judgment may be entered against him for want of a sufficient answer; but if an apparently legal defense is disclosed, it is said that the case is at issue. The plaintiff may then order it to be placed upon the trial list or calendar of cases, when in due course it will be reached and tried in court.

Trial Judge.—A judge, called the trial judge, presides at the trial to determine questions of law including those relating to the admission of evidence. After the testimony has been heard, he also instructs the jury upon the application of the law to the facts before them.

Jury.—The jury is called by the court crier and if counsel for either party has any valid objection to any of the jurors, others will be substituted in their places. When a jury finally has been selected, its members are sworn to hear the witnesses and render a verdict in accordance with the evidence. The trial is then ready to proceed.

Issue.—By the pleadings, that is, the statement of claim and answer, an issue of fact has been raised; and it is to determine this issue that the trial is had. The plaintiff has the burden of proving his contention and calls witnesses to tesify for him.

Witnesses.—Persons who are to be summoned as witnesses are served with a paper called a subpoena which

commands them to appear in court on a certain day and threatens a penalty if they do not appear. Witnesses failing to obey a subpoena are placed under arrest by a court officer, brought before the judge and sometimes severely punished. The power of courts to compel attendance of witnesses is founded upon their general powers to punish for contempt of court.

Testimony and Examination by Lawyers.—A witness goes upon the witness-stand, is sworn and then tells his story. He may be questioned by the lawyer for either party. When the plaintiff's witnesses have finished testifying, he rests; that is, he has placed his side of the case before the jury and awaits the testimony of the defendant.

Non-Suit.—At this point, if the attorney for defendant is of opinion that the plaintiff has not established an apparent right to a verdict, he will ask the court to enter a non-suit against the plaintiff. This means that the latter loses the contest at once without the defendant being required to offer any testimony.

Defense.—The court may refuse the non-suit and then the case will proceed, the defendant calling his witnesses, who may be questioned by the lawyers as the other witnesses were questioned.

Points for Charge—Binding Instructions.—When all the evidence has been heard, counsel for either side may give the court points for charge and motions for binding instructions. A point for charge is a written request to the court (judge) to instruct the jury in a certain way; while a motion for binding instructions is a written request that the court tell the jury that under all the evidence before them they must render a

verdict for either the plaintiff or the defendant, as the case may be.

Lawyers' Speeches.—The attorney for the plaintiff then addresses the jury, summarizing the testimony, sometimes showing how the law applies and always asking them to find a verdict for his client. The defendant's counsel then makes a like plea. Counsel for the plaintiff usually has a right to reply, thus securing the advantage of the last word.

Charge of Court.—The court then addresses or "charges" the jury, briefly reviewing the evidence and instructing the jurors upon points of law involved; and he may also give them binding instructions in favor of either party. If no binding instructions are given, the case then is considered by the jury, who, after due deliberation, render their verdict.

Motions for New Trial.—Within a few days (usually four days) after the verdict has been rendered, the losing party, if he be of the opinion that the verdict was improperly rendered and injustice has been done, may file written objections to bring the matter before the court again; but if no objections are filed, judgment may be entered upon the verdict.

Trial Without a Jury.—If a case is tried before a judge without a jury, the proceedings are the same as above, except that the judge decides the facts as well as the law; and his decision is termed a "finding" instead of a "verdict."

Appeals.—Appeals from judgments obtained in the manner described are based upon questions of law and are of too technical a nature to warrant discussion here.

XXIX

CRIMINAL PROCEDURE

Knowledge of Criminal Law a Necessity.—If a man be sued civilly or if he himself is the plaintiff he is more or less a by-stander; consequently he may leave intimate knowledge of civil procedure to his lawyer. But if he be arrested charged with a crime he is such a principal that he cannot have too much personal knowledge of his rights; he cannot afford to put his liberty or perhaps his life solely in the hands of his attorney. A certain celebrated case recently decided in favor of the defendant owes its conclusion to the knowledge which the defendant had concerning his own case.

All the People Against One.—The defendant should realize that the state has the power and resources of all the people and that he stands alone, resting upon the presumption of his innocence.

Arrests—How Made.—Arrests on criminal charges may be made in one of two ways:

1. By warrant, supported by affidavit of the person aggrieved.

2. Without warrant.

By Warrant Upon Affidavit.—The person aggrieved or injured may go before any magistrate or justice of the peace and there make affidavit to facts disclosing a crime; whereupon it is the duty of the magistrate or justice of the peace to issue a warrant

requiring any officer of the law to take the body of the defendant named in the warrant and confine him if necessary so that he may appear before the magistrate for a hearing. He who makes the affidavit is thereupon called the private prosecutor to distinguish him from the State or public prosecutor.

Service of Warrant.—Most warrants are served by constables but they may be served by any peace officer, such as a policeman.

Hearing Before Magistrate or Justice.—At the hearing, the question before the magistrate is whether or not the defendant appears to have committed a crime under the laws of the commonwealth. If it appears that he has done so, the magistrate will hold him for court; but if not, the magistrate will discharge him.

Summary Convictions—Right of Appeal.—In most States there is a procedure whereby a magistrate may try petty offenders and dispose of their cases at once. These are known as summary conviction cases because the magistrate may sentence the prisoner to the House of Correction, Reformatory or the County Prison. Idle and disorderly persons, habitual drunkards and breach of ordinance cases come within this classification. As said in a previous lecture, a defendant summarily convicted has a right to appeal to the Quarter Sessions and to be tried there before a jury.

Case Returned to Court.—If the magistrate decides to hold the defendant for court he may fix the amount of bail necessary to secure the defendant's appearance in court, or he may commit him to jail with-

out bail as in murder, highway robbery and burglary cases.

Habeas Corpus.—Where the magistrate commits without bail a writ of habeas corpus may be secured or bail may be fixed by a judge of the Oyer and Terminer Court. If the prisoner secures bail he remains at liberty until the day of his trial in the criminal court. If he is unable to secure bail, he remains in the county prison until that day.

BAIL

Justification of Bail.—The person who desires to become bail for the release of the defendant from prison is sworn by the magistrate and then questioned or examined concerning the real estate which he owns. This examination should disclose the location, assessment, value and incumbrances of the property and is known as the justification of bail. When the bail-bond has been signed by the bail and by the defendant, the latter is released.

Bail-Bond—Suit Thereon.—The bail-bond is made to the Commonwealth as obligee and contains a condition that if the defendant appear for trial the bond shall be void; otherwise to be in full force and effect. Notice that the defendant's case is on the list for trial is sent to the bail, and it is his duty to produce the defendant on the day fixed. If the defendant does not appear then the Commonwealth, through the District Attorney, may ask leave of court to sue out the bail-bond.

Bail-Piece.—In order to protect him from suit upon the bond the bail has a right to surrender the defend-

ant at any time before trial; and if the defendant, while at liberty on bail, should flee the jurisdiction of the court, the bail may secure from the court a paper called a bail-piece and upon this paper may arrest the defendant wherever he may be found. A man arrested upon a bail-piece may be taken across a state line without extradition proceedings being had.

Arrest Without Warrant.—Any peace officer (policeman) or constable may arrest without warrant one who is engaged in the commission of a crime; or the arrest may be made without warrant upon suspicion that the defendant is committing a crime or is about to commit one. These are instances of arrest "on view."

But if there is no warrant, or if there is no crime being committed nor reasonable ground for suspicion, then no arrest should be made unless a warrant is first obtained.

Indictment by Grand Jury.—After the hearing has been held by the magistrate and defendant has not been discharged, his case is returned to the criminal court. Properly prepared by the District Attorney it is presented to the grand jury of the county in which the offense has been committed and if the members of the grand jury believe that a prima facie case has been made out against the defendant they return a true bill of indictment against him. Otherwise the grand jury will ignore the charges and the defendant will not have to answer in the criminal court. The District Attorney and the Commonwealth's witnesses appear before the grand jury but the defense is not heard.

Trial—Pleas.—If a true bill of indictment is found the defendant is tried in the criminal court before a jury of twelve men, when he pleads either guilty or not guilty. If he pleads guilty he is immediately brought before the court for sentence but if he pleads not guilty his case will be decided by the jury. If they acquit him he is discharged at once. If they find him guilty the court will then pronounce sentence.

Sentence.—Space forbids discussion of suspended sentence, indeterminate sentence and parole.

XXX

BANKRUPTCY

Definition of "Bankrupt."—A bankrupt is a person, natural or artificial (corporation), whose assets are insufficient to pay his debts in full, and whose acts have brought him within the scope of the Federal bankruptcy laws.

Sources of Bankruptcy Law.—The framers of the United States Constitution wisely made provision for the establishment of bankruptcy laws and at various intervals Congress has passed laws upon the subject. By the Federal Act of 1898 and its supplements, the present bankruptcy laws were established and have proved generally satisfactory.

Purposes of the Law.—Bankruptcy laws have three general purposes:

1. The prevention of fraud.
2. The discharge of honest debtors.
3. The distribution of the bankrupt's estate among his creditors.

Kinds of Bankruptcy.—There are two kinds of bankruptcy, voluntary and involuntary.

Voluntary Bankruptcy.—In voluntary bankruptcy the bankrupt himself asks to be adjudicated (declared by the court to be) a bankrupt; and any person who has not sufficient assets to pay his debts in full, and all corporations with the exception of municipal, railroad, insurance and banking corporations, may become voluntary bankrupts.

Involuntary Bankruptcy.—Natural persons (excepting wage earners and farmers), and any monied, business or commercial corporation with the exception of those named above, owing debts of one thousand dollars or more, upon petition of three creditors whose claims against the debtor amount in the aggregate to five hundred dollars or more (exclusive of secured claims and preferences) may be thrown into involuntary bankruptcy. Also, where the whole number of creditors does not exceed twelve, then any one creditor having claims against the debtor (exclusive of secured claims and preferences), exceeding five hundred dollars or more, may file a petition in involuntary bankruptcy.

Jurisdiction—Parties in Interest.—All proceedings are under the jurisdiction of the District Court of the United States. The following persons are interested:

1. The bankrupt.
2. The judges of the District Court.
3. The referee.
4. Trustees.
5. Receivers.
6. Appraisers.
7. Attorneys.
8. Witnesses.
9. Creditors.

Bankrupt.—1. The bankrupt, as said above, is the person, either natural or artificial, who has not sufficient assets to pay all his debts and whose estate is to be administered in the bankruptcy proceeding.

Judges.—2. The Judges of the District Court have exclusive jurisdiction and control over the administra-

tion of the estate of the bankrupt but delegate a great measure of their authority to an official called a Referee.

Referee: His Duties.—3. The Referee is a judicial officer who is appointed by the District Court for a period of two years; and he may be reappointed at the discretion of the Court (as a matter of fact, most referees hold office during good behavior). The judge of the District Court refers an estate in bankruptcy to the Referee who then has exclusive jurisdiction in administering it. He passes judicially upon the claims of creditors; approves the selection of a trustee chosen by the creditors; if necessary, appoints a receiver to take temporary charge of the estate. He issues all orders for the conduct of the business or its sale; and determines the right of creditors to participate in the funds thus created, declaring the dividend to which they are entitled. Determines the right of those claiming priority and adjudicates all controversies that may arise in respect to the assets. Claimants, whose property is in the hands of the bankrupt at the time of the bankruptcy, must come before the referee with a petition for reclamation; while creditors holding assets of the bankrupt in pledge may have the value of their respective securities determined by him. He passes upon the compensation of receivers and trustees, and, after approval of the creditors, fixes the fees of attorneys representing the bankrupt and the trustee. He presides at and participates in the examination of the bankrupt and other witnesses; directs the placing of funds of the bankrupt estate in legal depositories, where they are held subject to his counter-signature. In all these matters his jurisdiction equals that of the

District Court; and unless appealed from, his orders are final.

Trustee.—The trustee is elected by the majority (both in number and amount) of the creditors, such election being approved by the referee. A trustee is obliged to give bond when he commences the performance of his duties, usually in an amount double the value of the bankrupt estate. He becomes vested with the title or ownership of the bankrupt's property, enabling him to maintain and defend suits at law in the name of the bankrupt; and converts all assets into cash, thus making it possible for the creditors to receive their dividends. In some cases he continues the business of the bankrupt.

Receiver.—5. To preserve the assets of the estate before the election of a trustee has taken place, the referee may appoint a receiver who becomes custodian of them; but upon election of a trustee, he is discharged.

Appraiser.—6. Appraisers are those persons who appraise the value of the bankrupt's estate.

Lawyers.—7. The bankrupt, trustee and other parties to bankruptcy proceedings have their interests represented by counsel, whose duties are those ordinarily incumbent upon a practising attorney in the conduct of a client's business.

Witnesses.—8. Witnesses are those persons called to testify.

Creditors.—9. Creditors are those persons who have provable claims against the bankrupt and who are entitled to elect a trustee and share in the distribution of dividends.

How Proceedings Begin.—All proceedings in bankruptcy are begun by petition, the bankrupt himself filing it in voluntary proceedings and the creditors filing it in involuntary bankruptcy. It should be noted that the bankrupt is not entitled to a jury trial except upon the questions of his insolvency and his commission of an act of bankruptcy.

Acts of Bankruptcy.—The Act designates the following to be acts of bankruptcy, they having been committed within four months of the filing of the petition:

1. That the debtor has conveyed, transferred, concealed or removed (or permitted same to be done) part of his property with intent to hinder, delay or defraud creditors.

2. That while insolvent, he has transferred property to one or more creditors with intent to prefer such creditor over other creditors.

3. That while insolvent, he permitted a creditor to obtain preference through legal proceedings.

4. That he has made a general assignment for the benefit of creditors; or, being insolvent, applied for a receiver or trustee.

5. That he has admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Meetings Before Referee.—The case having been referred to a referee, it becomes his duty to call a meeting of creditors, at which meeting he presides. Creditors then present their claims in the proper manner and it is the duty of the referee to pass upon them. Those whose claims are allowed are entitled to participate in the administration of the estate.

The first business is to elect a trustee whose duties have already been outlined.

Examination of Bankrupt.—The bankrupt is obliged to submit to an examination before the judge or referee concerning his property and conduct; and any other person, including the wife of the bankrupt, may be similarly subjected to an examination concerning these matters. The discretion of the referee, only limited by the constitutional right of the witness not to incriminate himself, determines the scope of the inquiry.

Discharge of Bankrupt.—The bankrupt is discharged under a petition filed by him for that purpose, after he has been examined and has transferred his assets to his trustee; and he is entitled to it unless one of his creditors or his trustee objects thereto because of the commission by him of such crimes, frauds or misrepresentations as are specified in the Act; or because of his failure to obey a lawful order or answer a material question; and in voluntary proceedings, unless he has been granted a discharge within six years.

May Re-enter Business.—Where a bankrupt has been thus discharged he is free to enter business again if he so desires.

Claims Not Discharged.—However, there are some claims that are not released by his discharge in bankruptcy. They are as follows:

1. Taxes due to the United States, State, County or Municipality.

2. Liability for obtaining property by false pretenses; for wilful and malicious injuries to the person

or property of another; and for alimony or maintenance and support of wife or child.

3. Debts that have not been duly scheduled for proof and allowance, unless such creditor had notice or actual knowledge of the proceeding in bankruptcy.

4. Debts created by his fraud, embezzlement, misappropriation or defalcation while acting in any fiduciary capacity.

It should be noted in passing that these debts are provable, and the owners of them may take dividends, but they are not discharged unless entirely paid.

Composition.—The Bankruptcy Act provides also for composition proceedings. Briefly, "composition" means that the creditors and the debtor come to an agreement whereby the creditors are willing to take a certain percentage on the dollar in full satisfaction of their claims. A debtor who wishes to arrange for a composition secures the signatures of a majority in number and amount of his creditors, agreeing to the proposed composition. Then a judge of the District Court, if he be of opinion that it is for the best interests of the creditors, that the debtor has done no act that would prevent his discharge in bankruptcy and has acted in good faith, may affirm the composition.

Advantages of Composition.—Composition, compared with bankruptcy, offers an advantage to the debtor in that it enables him to continue his business; and it is much cheaper for the creditors since the costs are not so large as in bankruptcy proceedings.

XXXI

INTERSTATE COMMERCE COMMISSION—PUBLIC SERVICE COMMISSIONS

Fear of Monopoly.—During the period of commercial expansion immediately succeeding the Civil War the people of the United States became alarmed at what they believed to be evidences of combinations in restraint of trade. It may very well have been that these evidences were really the results of an inevitable trade growth; but the people believed that the tendency towards monopoly should be curbed.

Sherman Anti-Trust Law—Interstate Commerce Commission Created.—In 1890 was passed the famous Sherman Anti-Trust Law which was the forerunner of many similar laws. It was believed that these laws should be administered by some executive authority, and in response to this idea Congress created the Interstate Commerce Commission. The Commission, however, was left without adequate powers to enforce the laws until about 1906, when Congress conferred upon it additional powers which have been increased since that time.

Anti-Trust Laws.—It is impossible here to enter into an extended discussion of these laws which include the Hepburn Act, prohibiting a common carrier transporting goods of which it is the owner, except such as are intended for its own use; the Elkins Act which prohibits soliciting, offering or accepting rebates; the Clayton Act, the main provisions of which will go into effect in October, 1916; and the Act which directs the

Interstate Commerce Commission to make a physical valuation of railroad property in the United States.

Duties of Interstate Commerce Commission.—The Interstate Commerce Commission is a body of seven men appointed by the President of the United States, whose duties are to enforce Federal laws relating to interstate and foreign commerce. The Commission supervises charges for the transportation of passengers and freight and for the transmission of messages by wire and by wireless; enforces reasonable regulations concerning classifications, rates, accepting, packing, handling—including icing, storage and terminal charges—and delivering of freight, baggage and express matter; the issuance of tickets and passes; prescribes a uniform method of bookkeeping for common carriers and requires annual reports from them; prosecutes inquiries into railroad disasters—both physical and financial—both in person or by agents in any part of the United States; enforces the provisions of the various safety appliance Acts concerning signal systems, locomotive boilers and ash pans, automatic couplers and transportation of explosives, etc; enforces Acts relating to hours of service of interstate railroad employees; supervises the issuance of medals of honor for saving life in railroad disasters; revises the classifications of the Parcel Post; enforces laws requiring furnishing of side tracks and cars to shippers; prohibiting railroads from acquiring competing lines; requiring names of agents to be posted in railroad stations; requiring copies of rates and classifications and traffic contracts to be filed with the Commission, and requiring carriers to give thirty days' notice of proposed changes in rates.

Interstate Scope.—The activities outlined above are confined to the regulation of interstate and foreign business carried on by persons and corporations such as pipe line, telegraph, telephone, cable, wireless, railroad, express, sleeping car and steamship companies.

Powers of Commissions.—Properly to exercise these regulatory functions the Commission has been empowered to subpoena and examine witnesses and to compel the production of books and papers anywhere in the United States. Persons aggrieved or who allege that the Federal laws regulating interstate and foreign commerce have been violated, may file complaints; and upon hearing, the Commission may dispose of same and may award damages. If the damages be unpaid, suit may be begun upon said awards in the appropriate United States District Court.

Powers of Federal Courts.—Any United States District Court of proper jurisdiction may enforce, suspend or annul any order of the Commission.

Public Service Commissions.—Following in the path of Congress many of the States have established bodies similar in nature to the Interstate Commerce Commission, to supervise public service corporations in their methods of conducting business within a particular State; in other words, State laws and regulations are enforced by these State bodies against the same class of persons and corporations, who, if doing an interstate business would be supervised by the Interstate Commerce Commission.

The Pennsylvania Commission.—The Pennsylvania Public Service Commission which was established by a law approved in 1913, succeeding the State Railroad Commission, is typical of these State commissions.